

**OFFICIAL CODE
OF
GEORGIA
—
ANNOTATED**



VOLUME 19

Title 22. Eminent Domain

Title 23. Equity



Digitized by the Internet Archive
in 2013

<http://archive.org/details/govlawgacode19>

OFFICIAL CODE OF GEORGIA ANNOTATED

With Provision for Subsequent Pocket Parts

Prepared by

The Code Revision Commission
The Office of Legislative Counsel

and

The Editorial Staff of the Michie Company



Published Under Authority of the State of Georgia

Volume 19

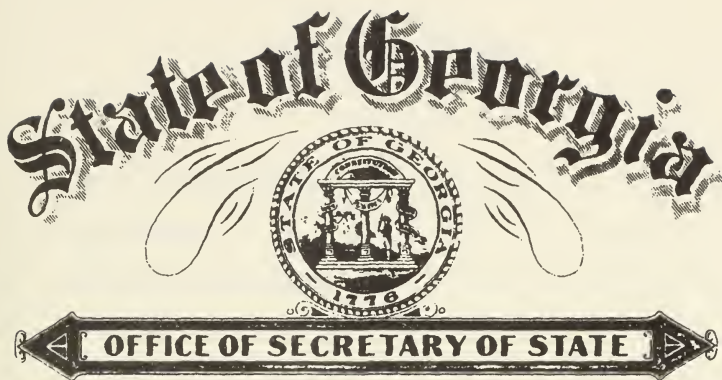
Including Acts of the 1981 Extraordinary Session of the General
Assembly of Georgia and Annotations Taken from the
Georgia Reports Through Volume 247, page 556,
and the Georgia Appeals Reports Through
Volume 157, page 240

THE MICHIE COMPANY
Law Publishers
Charlottesville, Virginia
1982

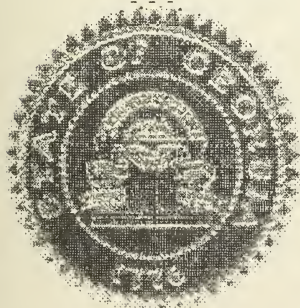
COPYRIGHT 1982
BY
STATE OF GEORGIA



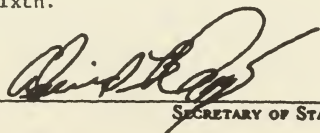
4188610



I, David B. Poythress, Secretary of State of the State of Georgia, do hereby certify that the statutory portion of the Official Code of Georgia Annotated contained in this volume is a true and correct copy of such material as enacted by the General Assembly of Georgia; all as the same appear of file and record in this office.



IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of my office, at the Capitol, in the City of Atlanta, this 26th day of March, in the year of our Lord One Thousand Nine Hundred and Eighty-two and of the Independence of the United States of America the Two Hundred and Sixth.



SECRETARY OF STATE.

Table of Titles

Title	1. General Provisions.
	2. Agriculture.
	3. Alcoholic Beverages.
	4. Animals.
	5. Appeal and Error.
	6. Aviation.
	7. Banking and Finance.
	8. Buildings and Housing.
	9. Civil Practice.
	10. Commerce and Trade.
	11. Commercial Code.
	12. Conservation and Natural Resources.
	13. Contracts.
	14. Corporations, Partnerships, and Associations.
	15. Courts.
	16. Crimes and Offenses.
	17. Criminal Procedure.
	18. Debtor and Creditor.
	19. Domestic Relations.
	20. Education.
	21. Elections.
	22. Eminent Domain.
	23. Equity.
	24. Evidence.
	25. Fire Protection and Safety.
	26. Food, Drugs, and Cosmetics.
	27. Game and Fish.
	28. General Assembly.
	29. Guardian and Ward.

TABLE OF TITLES

30. Handicapped Persons.
31. Health.
32. Highways, Bridges, and Ferries.
33. Insurance.
34. Labor and Industrial Relations.
35. Law Enforcement Officers and Agencies.
36. Local Government.
37. Mental Health.
38. Military, Emergency Management, and Veterans Affairs.
39. Minors.
40. Motor Vehicles and Traffic.
41. Nuisances.
42. Penal Institutions.
43. Professions and Businesses.
44. Property.
45. Public Officers and Employees.
46. Public Utilities and Public Transportation.
47. Retirement and Pensions.
48. Revenue and Taxation.
49. Social Services.
50. State Government.
51. Torts.
52. Waters of the State, Ports, and Watercraft.
53. Wills, Trusts, and Administration of Estates.

In Addition, This Publication Includes

Constitution of the United States

Constitution of Georgia

Tables of Comparative Sections

Table of Acts

Index to Local and Special Laws

Index to General Laws of Local Application

General Index

Table of Contents

VOLUME 19

TITLE 22

EMINENT DOMAIN

CHAPTER	PAGE
1. General Provisions, 22-1-1 through 22-1-8	3
2. Condemnation Procedure Generally, 22-2-1 through 22-2-142	21
3. Exercise of Power of Eminent Domain for Special Purposes, 22-3-1 through 22-3-122	115
4. Relocation of Persons, Businesses, etc., Displaced by Federal-Aid Public Works Projects, 22-4-1 through 22-4-14	141

TITLE 23

EQUITY

CHAPTER	PAGE
1. General Provisions, 23-1-1 through 23-1-25	154
2. Grounds for Equitable Relief, 23-2-1 through 23-2-136	211
3. Equitable Remedies and Proceedings Generally, 23-3-1 through 23-3-110	339
4. Equity Procedure, 23-4-1 through 23-4-38	376
Index to Titles 22 and 23	PAGE 395

TITLE 22

EMINENT DOMAIN

- Chap. 1. General Provisions, 22-1-1 through 22-1-8.
2. Condemnation Procedure Generally, 22-2-1 through 22-2-142.
3. Exercise of Power of Eminent Domain for Special Purposes, 22-3-1 through 22-3-122.
4. Relocation of Persons, Businesses, etc., Displaced by Federal-Aid Public Works Projects, 22-4-1 through 22-4-14.

Cross references. — As to taking of private property for public purposes generally, see Ga. Const. 1976, Art. I, Sec. III, Para. I. As to prohibition against abridgement of right of eminent domain, see Ga. Const. 1976, Art. III, Sec. VIII, Para. II. As to exercise of right of eminent domain for slum clearance and redevelopment work, see Ga. Const. 1976, Art. IX, Sec. IV, Para. IV. As to powers of counties to exercise right of eminent domain, see Ga. Const. 1976, Art. IX, Sec. V, Para. IV. As to allocation of award upon exercise of power of eminent domain affecting condominiums, see § 44-3-97. As to taxation of special franchises, see § 48-5-420 et seq. As to authority of railroad companies to exercise power of eminent domain, see §§ 46-8-121, 46-8-124.

Law reviews. — For article discussing eminent domain procedure in this country, and advocating reforms focusing on a unified method for condemnation, see 11 Mercer L. Rev. 245 (1960). For article, "Eminent Domain, Police Power and

Urban Renewal: Compensation for Interim Depreciation in Land Values," see 7 Ga. L. Rev. 226 (1972). For article discussing extraterritorial condemnation of property by municipalities, see 12 Ga. L. Rev. 1 (1977). For article discussing developments in the law of eminent domain in 1976 to 1977, see 29 Mercer L. Rev. 219 (1977). For article surveying recent legislative and judicial developments in Georgia's real property laws, see 31 Mercer L. Rev. 187 (1979). For article surveying Georgia cases in the area of local government law from June 1979 through May 1980, see 32 Mercer L. Rev. 137 (1980).

For note on computation of compensation for condemned lands where value is enhanced by announcement of proposed improvement, see 15 Mercer L. Rev. 488 (1964). For note, "A Study of the Development and Current Status in Georgia of Inverse Condemnation Suits by a Landowner for Taking by Aerial Flights," see 2 Ga. St. B.J. 232 (1965).

JUDICIAL DECISIONS

Eminent domain statutes to be strictly construed. — Because statutes delegating the power of eminent domain are in derogation of the property rights of the citizens, such statutes are strictly construed. *Harwell v. Georgia Power Co.*, 246 Ga. 203, 269 S.E.2d 464 (1980).

Attorney fees are not available in condemnation actions. *Department of Transp. v. Worley*, 244 Ga. 783, 263 S.E.2d 436 (1979).

EMINENT DOMAIN

RESEARCH REFERENCES

ALR. — Power to establish building line
along street, 28 ALR 314.

GENERAL PROVISIONS

CHAPTER 1

GENERAL PROVISIONS

Sec.		Sec.	
22-1-1.	Definitions.	22-1-5.	Requirement of just compensation as a limitation on exercise of power of eminent domain.
22-1-2.	Nature of right of eminent domain.	22-1-6.	Right of persons to take or damage private property upon payment of just and adequate compensation.
22-1-3.	Power of General Assembly to determine when right of eminent domain may be exercised; duty of courts as to laws authorizing the condemnation of private property for private uses.	22-1-7.	Effect of failure to agree on compensation.
22-1-4.	Manner in which General Assembly may exercise right of eminent domain.	22-1-8.	Exclusive nature of title.

JUDICIAL DECISIONS

Land value and consequential damages are matters of opinion. — Where the question is the value of the land taken and condemned and the amount of consequential damages to be assessed against the condemnor for the remaining land, these

matters are from the necessity of the case matters of opinion. *Derrick v. Rabun County*, 107 Ga. App. 229, 129 S.E.2d 583 (1963).

Cited in *Elberton S. Ry. v. State Hwy. Dep't*, 211 Ga. 838, 89 S.E.2d 645 (1955).

RESEARCH REFERENCES

ALR. — State power of eminent domain over property of United States, 4 ALR 548.

Depreciation of property by the erection of a hospital by a municipality as a "taking" or "damaging" within the constitutional provision, 4 ALR 1012.

Eminent domain: power to condemn against particular use of property, 8 ALR 594.

Exercise of eminent domain for purpose of irrigating land of private owner, 9 ALR 583.

Loss of right to contest assessment in proceeding for street or sewer improvement by waiver, estoppel, or the like, 9 ALR 634.

Loss of right to contest assessment in drainage proceeding by waiver, estoppel, or the like, 9 ALR 842.

Right of owner of fee burdened with easement in nature of street, private or public, to compensation on condemnation of property for public street, 17 ALR 1249.

Street forming boundary of city as urban or rural, as affecting right of abutting owners to compensation for use by public utilities, 30 ALR 746.

Right to compensation for improvements made under authority, or color thereof, by body having power of eminent domain, before exercise of that power, 34 ALR 1082.

Furnishing electricity to public as public use or purpose for which power of eminent domain may be exercised, 44 ALR 735.

Right of abutting owner to compensation for interference with access by bridge or other structure in public street or highway, 45 ALR 534.

Depreciation of property by location of school as taking or damaging within constitutional provision, 48 ALR 1031.

Constitutionality of statute authorizing hauling or floating logs or other material through private property, 51 ALR 1199.

Eminent domain: combination of public and private uses or purposes, 53 ALR 9.

Right to compensation in eminent domain on basis of entire extent of property or complete use ultimately contemplated in excess of present requirements, 75 ALR 855.

Power of eminent domain conferred upon municipality as authorizing taking fee or merely easement, 79 ALR 515.

Exercise of power of eminent domain for purposes of logging road or logging railroad, 86 ALR 552.

Right of owner of property not abutting on closed section to compensation for vacation of street or highway, 93 ALR 639.

Right of owner of dominant estate to have compensation for taking of easement by eminent domain determined with reference to land and improvements held in the dominant estate, 98 ALR 640.

Exercise of eminent domain for purpose of increasing right or interest which petitioner already owns or relieving the property or petitioner of some burden or obligation in respect of property, 108 ALR 1522.

Right of municipality or other governmental body seeking to acquire public utility to proceed in the manner prescribed generally for exercise of eminent domain, 109 ALR 384.

Right to take property under eminent domain as affected by fact that property is already devoted to cemetery purposes, 109 ALR 1502.

Injunction against exercise of power of eminent domain, 133 ALR 11; 93 ALR2d 465.

Compensation for property confiscated

or requisitioned during war, 149 ALR 1451.

General governmental policy (distinguished from specific project) as affecting compensation allowable in eminent domain, 167 ALR 502.

Condemnation of materials for highway or other public or quasi-public works, 172 ALR 131.

Condemnation of land by public authority, to provide hunting and fishing, 172 ALR 174.

Attorney's fees as within statute imposing upon condemner liability for "expenses," "costs," and the like, 26 ALR2d 1295.

Spur track and the like as constituting a use for which railroad can validly exercise right of eminent domain, 35 ALR2d 1326.

Condemnor's acquisition of, or right to, minerals under land taken in eminent domain, 36 ALR2d 1424.

Liability of public utility to abutting owner for destruction or injury of trees in or near highway or street, 64 ALR2d 866.

Right to view by jury in condemnation proceedings, 77 ALR2d 548.

Zoning as a factor in determination of damages in eminent domain, 9 ALR3d 291.

Eminent domain: charging landowner with rent or use value of land where he remains in possession after condemnation, 20 ALR3d 1164.

Propriety of court's consideration of ecological effects of proposed project in determining right of condemnation, 47 ALR3d 1267.

Plotting or planning in anticipation of improvement as taking or damaging of property affected, 49 ALR3d 127.

What constitutes abandonment of eminent domain proceeding so as to charge condemnor with liability for condemnee's expenses or the like, 68 ALR3d 610.

22-1-1. Definitions.

As used in this title, the term:

(1) "Interest" means any title or nontitle interest other than fee simple title.

(2) "Persons" means individuals, partnerships, associations, and corporations, domestic or foreign.

(3) "Property" means fee simple title. (Ga. L. 1929, p. 219, § 3; Code 1933, § 36-201.)

Cross references. — As to fee simple estates generally, see § 44-6-20 et seq.

Law reviews. — For comment on Botts v. Southeastern Pipeline Co., 190 Ga. 689, 10

S.E.2d 375 (1940); Harrell v. Southeastern Pipeline Co., 190 Ga. 709, 10 S.E.2d 387 (1940), see 3 Ga. B.J. 49 (1941).

JUDICIAL DECISIONS

Cited in State Hwy. Dep't v. H.G. Hastings Co., 187 Ga. 204, 199 S.E. 793 (1938); Botts v. Southeastern Pipe-Line

Co., 190 Ga. 689, 10 S.E.2d 375 (1940); Harrell v. Southeastern Pipe-Line Co., 190 Ga. 709, 10 S.E.2d 386 (1940).

RESEARCH REFERENCES

ALR. — Power to establish building line along street, 44 ALR 1377.

Right of public body to compensation

where property held by it is taken for another public purpose, 56 ALR 365.

22-1-2. Nature of right of eminent domain.

The right of eminent domain is the right of the state, through its regular organization, to reassert, either temporarily or permanently, its dominion over any portion of the soil of the state on account of public exigency and for the public good. Thus, in time of war or insurrection the proper authorities may possess and hold any part of the territory of the state for the common safety; and in time of peace the General Assembly may authorize the appropriation of the same to public purposes, such as the opening of roads, construction of defenses, or providing channels for trade or travel. (Orig. Code 1863, § 2201; Code 1868, § 2196; Code 1873, § 2222; Code 1882, § 2222; Civil Code 1895, § 3052; Civil Code 1910, § 3624; Code 1933, § 36-101.)

Law reviews. — For comment on Botts v. Southeastern Pipeline Co., 190 Ga. 689, 10 S.E.2d 375 (1940); Harrell v. Southeastern Pipeline Co., 190 Ga. 709, 10 S.E.2d 387

(1940), see 3 Ga. B.J. 49 (1941); State Hwy. Dep't v. Lumpkin, 222 Ga. 727, 152 S.E.2d 557 (1966), see 3 Ga. St. B.J. 483 (1967).

JUDICIAL DECISIONS

Taking property for public use is legislative, not judicial, function. — The necessity or expediency of appropriating particular property for public use is not a matter of judicial cognizance, but one for the determination of the legislative branch of the government, and this must obviously be so where the state takes for its own purposes. *State Hwy. Dep't v. Smith*, 219 Ga. 800, 136 S.E.2d 334 (1964).

And notice to owner not required before determination of necessity. — Since the necessity for taking private property for a public use is a legislative and not a judicial function, due process does not require notice to the owner nor an opportunity to be heard by him before such determination can be made. *State Hwy. Dep't v. Smith*, 219 Ga. 800, 136 S.E.2d 334 (1964).

Eminent domain statutes to be strictly construed. — Since the power to take private property for a public use or benefit is in derogation of the right of the citizen, statutes under which it is claimed must be strictly construed, and it is generally held that the power is not conferred unless an intention to that effect appears in clear and express terms, or by necessary implication. *Botts v. Southeastern Pipe-Line Co.*, 190 Ga. 689, 10 S.E.2d 375 (1940). For comment, see 3 Ga. B.J. 49 (1941).

The exercise of the right of eminent domain is a legislative function, and the powers delegated by the General Assembly thereunder must be exercised in strict conformity with the statute. *Department of Transp. v. Worley*, 150 Ga. App. 768, 258 S.E.2d 595 (1979).

No right to take land for private use. —

The power of eminent domain may never be used to acquire property to be used by private individuals solely for private use and private gain. *City of Atlanta v. Atlanta Gas Light Co.*, 144 Ga. App. 157, 240 S.E.2d 730 (1977).

Nor to take more land than necessary for public use. — When more land is taken than is necessary for public uses, it is in effect a taking for private use, or for no use; in either instance, the right does not exist. *Heirs of Champion v. City of Atlanta*, 149 Ga. App. 470, 254 S.E.2d 706 (1979); *City of Atlanta v. First Nat'l Bank*, 154 Ga. App. 658, 269 S.E.2d 878 (1980).

Right rests largely in discretion of exercising authority. — In the absence of bad faith the exercise of the right of eminent domain rests largely in the discretion of the authority exercising such right, both as to necessity and amount. *City of Atlanta v. First Nat'l Bank*, 154 Ga. App. 658, 269 S.E.2d 878 (1980).

Substituted condemnation. — Where property is condemned for exchange with another public utility, and the property will be used for a public purpose, this is called "substituted condemnation," and this is a valid exercise of the condemnor's power of eminent domain. *City of Atlanta v. Atlanta Gas Light Co.*, 144 Ga. App. 157, 240 S.E.2d 730 (1977).

Cited in *Felton v. State Hwy. Bd.*, 51 Ga. App. 930, 181 S.E. 506 (1935); *Williamson v. Housing Auth.*, 186 Ga. 673, 199 S.E. 43 (1938); *Housing Auth. v. Savannah Iron & Wire Works, Inc.*, 90 Ga. App. 150, 82 S.E.2d 244 (1954).

OPINIONS OF THE ATTORNEY GENERAL

Legislature may authorize municipality's acquisition of land beyond its limits. — The Legislature has power to authorize a municipal corporation to acquire lands beyond the municipal limits

and for that purpose to exercise the power of eminent domain, where the proposed taking of private property is strictly for public use. 1965-66 Op. Att'y Gen. No. 66-65.

RESEARCH REFERENCES

Am. Jur. 2d. — 26 Am. Jur. 2d, Eminent Domain, §§ 1, 2, 13-16, 25-37.

C.J.S. — 29A C.J.S., Eminent Domain, §§ 1-5, 19, 29-31.

ALR. — Exercise of eminent domain for purpose of irrigating land of private owner, 9 ALR 583.

Right to condemn property previously condemned or purchased for public use, but not actually so used, 12 ALR 1502.

Exercise of eminent domain to control the use or improvement of property not taken, 23 ALR 876.

Constitutionality of statute conferring power of eminent domain on private corporation or association for educational, religious, or recreational purpose, 50 ALR 1530.

Constitutionality of statute or ordinance denying right of property owners to defeat a proposed street improvement by protest, 52 ALR 883.

Public benefit or convenience as distinguished from use by the public as ground for the exercise of the power of eminent domain, 54 ALR 7.

Right of public body to compensation where property held by it is taken for another public purpose, 56 ALR 365.

Right of public body to compensation where property held by it is taken for another public purpose, 56 ALR 365.

Exercise of eminent domain to preserve places of historical interest, 59 ALR 945.

Power to condemn, or authorize the condemnation of, capital stock of a public utility, 81 ALR 1071.

Diversion of park property to other uses as taking or damaging neighboring prop-

erty without compensation, 83 ALR 1435.

State power of eminent domain as affected by interstate character of uses to which property taken is to be devoted, 90 ALR 1032.

Obstruction or diversion of, or other interference with, flow of surface water as taking or damaging property within constitutional provision against taking or damaging without compensation, 128 ALR 1195.

Retention, by building or other fixture, of its character as real property, for purposes of statute authorizing condemnation of real property, notwithstanding agreement treating it as personalty, 151 ALR 1429.

Condemnation of public utility property for public utility purposes, 173 ALR 1362.

Electric light or power line in street or highway as additional servitude, 58 ALR2d 525.

Eminent domain: what constitutes sufficient attempt to agree on purchase or compensation, 90 ALR2d 211.

Right to condemn property in excess of needs for a particular public purpose, 6 ALR3d 297.

Substitute condemnation: power to condemn property or interest therein to replace other property taken for public use, 20 ALR3d 862.

Eminent domain: right to enter land for preliminary survey or examination, 29 ALR3d 1104.

Eminent domain: validity of appropriation of property for anticipated future use, 80 ALR3d 1071.

22-1-3. Power of General Assembly to determine when right of eminent domain may be exercised; duty of courts as to laws authorizing the condemnation of private property for private uses.

It is the province of the General Assembly to determine when the right of eminent domain may be exercised. If, however, under pretext of such necessity the General Assembly should pass a law authorizing the taking of property for private use rather than for public use, the courts should declare the law inoperative. (Orig. Code 1863, § 2202; Code 1868, § 2197; Code 1873, § 2223; Code 1882, § 2223; Civil Code 1895, § 3053; Civil Code 1910, § 3625; Code 1933, § 36-102.)

JUDICIAL DECISIONS

Taking property for public use is legislative, not judicial, function. — The necessity or expediency of appropriating particular property for public use is not a matter of judicial cognizance, but one for the determination of the legislative branch of the government, and this must obviously be so where the state takes for its own purposes. *State Hwy. Dep't v. Smith*, 219 Ga. 800, 136 S.E.2d 334 (1964).

And Legislature has exercised jurisdiction granted by section. — In the exercise of the jurisdiction granted by this section, the Legislature passed acts which are embodied in this Code as §§ 44-8-4 and 22-3-20. *Central Ga. Power Co. v. Ham*, 139 Ga. 569, 77 S.E. 396 (1913).

Notice to owner not required before determination of necessity. — Since the necessity for taking private property for a public use is a legislative and not a judicial function, due process does not require notice to the owner nor an opportunity to be heard by him before such determination can be made. *State Hwy. Dep't v. Smith*, 219 Ga. 800, 136 S.E.2d 334 (1964).

No right to take more land than necessary for public use. — The taking of more land than is necessary for public purposes cannot be justified on the principles underlying the right of eminent domain. When more land is taken than is necessary for public uses, it is in effect a taking for private use, or for no use; in either instance, the right does not exist. *Heirs of Champion v. City of Atlanta*, 149 Ga. App. 470, 254 S.E.2d 706 (1979); *City of Atlanta*

v. First Nat'l Bank, 154 Ga. App. 658, 269 S.E.2d 878 (1980).

Entity authorized to exercise eminent domain is afforded discretion in determining the extent of the estate or the interest in land necessary for the particular public purpose, and that discretion is to be controlled only upon a showing of bad faith. *Heirs of Champion v. City of Atlanta*, 149 Ga. App. 470, 254 S.E.2d 706 (1979).

Determining amount of land necessary. — A condemnor is not limited to taking the amount of land that is absolutely necessary, but is limited to the amount that is reasonably necessary under all the facts and circumstances regarding the particular matter under consideration. The word "necessary" is not meant to be used in the sense of indispensable. *Heirs of Champion v. City of Atlanta*, 149 Ga. App. 470, 254 S.E.2d 706 (1979).

Court to reduce amount of land where attempted condemnation exceeds necessity. — If it should appear that the land sought to be condemned is more than is necessary for public purposes, then the amount should be reduced by the courts to such amount as is necessary for public purposes. *Heirs of Champion v. City of Atlanta*, 149 Ga. App. 470, 254 S.E.2d 706 (1979).

Cited in *Williamson v. Housing Auth.*, 186 Ga. 673, 199 S.E. 43 (1938); *Russell v. Venable*, 216 Ga. 137, 115 S.E.2d 103 (1960); *Norton Realty & Loan Co. v. Board of Educ.*, 129 Ga. App. 668, 200 S.E.2d 461 (1973).

RESEARCH REFERENCES

Am. Jur. 2d. — 26 Am. Jur. 2d, Eminent Domain, §§ 5, 38.

C.J.S. — 29A C.J.S., Eminent Domain, §§ 19, 29-31, 87, 88.

ALR. — Exercise of eminent domain to control the use or improvement of property not taken, 23 ALR 876.

Right of abutting owner to compensation for interference with access by bridge or other structure in public street or highway, 45 ALR 534.

Constitutionality of statute conferring power of eminent domain on private corporation or association for educational, religious, or recreational purpose, 50 ALR 1530.

Public benefit or convenience as distinguished from use by the public as ground for the exercise of the power of eminent domain, 54 ALR 7.

Power to condemn, or authorize the condemnation of, capital stock of a public utility, 81 ALR 1071.

Diversion of park property to other uses as taking or damaging neighboring property without compensation, 83 ALR 1435.

Injunction against exercise of power of eminent domain, 133 ALR 11; 93 ALR2d 465.

22-1-4. Manner in which General Assembly may exercise right of eminent domain.

The General Assembly may exercise the right of eminent domain directly through the officers of the state, through the medium of corporate bodies, or by means of individual enterprise. (Orig. Code 1863, § 2203; Code 1868, § 2198; Code 1873, § 2224; Code 1882, § 2224; Civil Code 1895, § 3054; Civil Code 1910, § 3626; Code 1933, § 36-103.)

Law reviews. — For note, "Regulation and Ownership of the Marshlands: The

Georgia Marshlands Act," see 5 Ga. L. Rev. 563 (1971).

JUDICIAL DECISIONS

Taking property for public use is legislative, not judicial, function. — The necessity or expediency of appropriating particular property for public use is not a matter of judicial cognizance, but one for the determination of the legislative branch of the government, and this must obviously be so where the state takes for its own purposes. *State Hwy. Dep't v. Smith*, 219 Ga. 800, 136 S.E.2d 334 (1964).

And notice to owner not required before determination of necessity. — Since the necessity for taking private property for a public use is a legislative and not a judicial function, due process does not require notice to the owner nor an opportunity to be heard by him before such determination

can be made. *State Hwy. Dep't v. Smith*, 219 Ga. 800, 136 S.E.2d 334 (1964).

Eminent domain statutes to be strictly construed. — Since the power to take private property for a public use or benefit is in derogation of the right of the citizen, statutes under which it is claimed must be strictly construed, and it is generally held that the power is not conferred unless an intention to that effect appears in clear and express terms, or by necessary implication. *Botts v. Southeastern Pipe-Line Co.*, 190 Ga. 689, 10 S.E.2d 375 (1940).

Cited in *Williamson v. Housing Auth.*, 186 Ga. 673, 199 S.E. 43 (1938); *Russell v. Venable*, 216 Ga. 137, 115 S.E.2d 103 (1960).

OPINIONS OF THE ATTORNEY GENERAL

Legislature may authorize municipality's acquisition of land beyond its limits. — The Legislature has power to authorize a municipal corporation to acquire lands beyond the municipal limits

and for that purpose to exercise the power of eminent domain, where the proposed taking of private property is strictly for public use. 1965-66 Op. Att'y Gen. No. 66-65.

RESEARCH REFERENCES

Am. Jur. 2d. — 26 Am. Jur. 2d, Eminent Domain, §§ 5-7, 17-24.

C.J.S. — 29A C.J.S., Eminent Domain, §§ 19, 21-28, 89-94.

ALR. — Condemnation by de facto corporation, 44 ALR 542.

Constitutionality of statute conferring power of eminent domain on private corporation or association for educational, religious, or recreational purpose, 50 ALR 1530.

22-1-5. Requirement of just compensation as a limitation on exercise of power of eminent domain.

Except in cases of extreme necessity and great urgency, the right of eminent domain cannot be exercised without first providing for just compensation to the owner for the interference with his exclusive rights. (Orig. Code 1863, § 2204; Code 1868, § 2199; Code 1873, § 2225; Code 1882, § 2225; Civil Code 1895, § 3055; Civil Code 1910, § 3627; Code 1933, § 36-104.)

Cross references. — See Ga. Const. 1976, Art. I, Sec. III, Para. I.

Law reviews. — For comment on

DeKalb County v. Trustees, Decatur Lodge No. 1602, 242 Ga. 707, 251 S.E.2d 243 (1978), see 31 Mercer L. Rev. 367 (1979).

JUDICIAL DECISIONS

Eminent domain statutes must be strictly construed. — The taking or injuring of private property for the public benefit is the exercise of a high power, and all the conditions and limitations provided by law, under which it may be done, should be closely followed. Too much caution in this respect cannot be observed to prevent abuse and oppression. *Thomas v. City of Cairo*, 206 Ga. 336, 57 S.E.2d 192 (1950).

Private property cannot be taken for public uses, except under the forms and by due course of law. *Thomas v. City of Cairo*, 206 Ga. 336, 57 S.E.2d 192 (1950).

Owner entitled to compensation as of date of taking. — When private property is condemned for public use the owner is entitled to receive just and adequate compensation as of the date of the taking and not as of the date of the announcement of the taking, and the value of the property should be fixed at the time of its taking. *R.E. Adams Properties, Inc. v. City of Gainesville*, 125 Ga. App. 800, 189 S.E.2d 114 (1972).

Compensation must be paid before property is taken. — In eminent domain proceedings the property owner must be paid just and adequate compensation before his property is taken. *Thomas v. City of Cairo*, 206 Ga. 336, 57 S.E.2d 192 (1950).

Taking includes interference with rights incident to property. — A taking of property for which compensation must be first paid does not require an actual physical taking, but may consist in an interference with the rights of ownership, use and enjoyment, or any other right incident to property. *Woodside v. City of Atlanta*, 214 Ga. 75, 103 S.E.2d 108 (1958).

Remote and speculative or possible damages are not allowed. *McCrea v. Georgia Power Co.*, 46 Ga. App. 276, 167 S.E. 540 (1933).

Market value is not the only criterion for determining just and adequate compensation where property is taken or damaged for public purposes. *State Hwy. Dep't v. Augusta Dist. of N. Ga. Conference of*

Methodist Church, 115 Ga. App. 162, 154 S.E.2d 29 (1967).

There are three recognized techniques for determining market value: replacement cost new less depreciation, income, and comparable sales. *Housing Auth. v. Southern Ry.*, 245 Ga. 229, 264 S.E.2d 174 (1980).

Loss of future revenue is not a proper measure of damages in condemnation procedures, but the value of property to the owner for the particular purpose for which he designs to use it can always be shown. *Harrison v. Regents of Univ. Sys.*, 105 Ga. App. 817, 125 S.E.2d 793 (1962).

Attorneys' fees need not be included in measuring just compensation under the Georgia Constitution. *Georgia Power Co. v. Sanders*, 617 F.2d 1112 (5th Cir. 1980).

"Unique" property. — Since valuing property at its fair market value presupposes a willing buyer and a willing seller, properties are "unique" where fair market value will not afford just and adequate compensation when they are not of a type generally bought or sold in the open market. *Housing Auth. v. Southern Ry.*, 245 Ga. 229, 264 S.E.2d 174 (1980).

Whether or not property is unique is a jury question. *Dixie Hwy. Bottle Shop, Inc. v. Department of Transp.*, 150 Ga. App. 839, 528 S.E.2d 646 (1979); *Department of Transp. v. Dixie Bottle Shop, Inc.*, 245 Ga. 314, 265 S.E.2d 10 (1980).

Valuation of "unique" property. — "Unique" property is measured by a variety of nonfair market methods of valuation, including the cost and income methods. *Housing Auth. v. Southern Ry.*, 245 Ga. 229, 264 S.E.2d 174 (1980).

It is not incorrect to instruct jury on lost profits as a means of awarding just and adequate compensation because the income approach necessarily takes into account what future earnings would be were the property interest not extinguished. *Housing Auth. v. Southern Ry.*, 245 Ga. 229, 264 S.E.2d 174 (1980).

Recovery of business losses. — Business losses are recoverable as a separate item only if the property is "unique." *Department of Transp. v. Dixie Hwy. Bottle Shop, Inc.*, 245 Ga. 314, 265 S.E.2d 10 (1980).

When a business belongs to the landowner, total destruction of the business at the location must be proven before business losses may be recovered as a separate element of compensation. *Department of Transp. v. Dixie Hwy. Bottle Shop, Inc.*, 245 Ga. 314, 265 S.E.2d 10 (1980).

When the business belongs to a separate lessee, the lessee may recover for business losses as an element of compensation separate from the value of the land whether the destruction of his business is total or merely partial, provided only that the loss is not remote or speculative. *Department of Transp. v. Dixie Hwy. Bottle Shop, Inc.*, 245 Ga. 314, 265 S.E.2d 10 (1980).

Application of law existing on date of appeal to case already tried. — Owners in condemnation cases have vested rights to just and adequate compensation which cannot be destroyed by applying the law existing as of the date of the appeal to a case that has already been tried. *Department of Transp. v. Worley*, 150 Ga. App. 768, 258 S.E.2d 595 (1979).

Limitations on action for interference with right of access. — The property owner whose right of access is damaged by public improvements to the streets either by obstructing or cutting off completely access or travel in a particular direction may maintain an action only when the interference is at or within the first intersecting block from his property. *Decatur County v. Settles*, 107 Ga. App. 150, 129 S.E.2d 212 (1962).

The Department of Transportation is not required to condemn or pay for, as a separate and additional item of damage, the taking of a nonexistent property right, the "right of access" to a limited-access highway, except where an old highway is included therein. *State Hwy. Dep't v. Kinsey*, 131 Ga. App. 770, 206 S.E.2d 835 (1974).

Cited in *Housing Auth. v. Savannah Iron & Wire Works, Inc.*, 90 Ga. App. 150, 82 S.E.2d 244 (1954); *Department of Transp. v. Glenn*, 243 Ga. 21, 252 S.E.2d 906 (1979).

OPINIONS OF THE ATTORNEY GENERAL

Owner's recovery not restricted to market value. — The constitutional and statutory provisions as to just and adequate compensation do not necessarily restrict

the owner's recovery to market value; the owner is entitled to the value of the property to him, not its value to the state. 1958-59 Op. Att'y Gen. p. 271.

RESEARCH REFERENCES

Am. Jur. 2d. — 26 Am. Jur. 2d, Eminent Domain, §§ 7, 150-156, 170-177. 27 Am. Jur. 2d, Eminent Domain, §§ 247-261, 266-278.

C.J.S. — 25A C.J.S., Damages, § 2. 29A C.J.S., Eminent Domain, §§ 96-205.

ALR. — Right to and measure of compensation to owner of fee when telegraph or telephone line is erected along railroad right of way or highway, 19 ALR 383.

Right of abutting owner to compensation for railroad in street under constitutional provision against damaging property for public use without compensation, 22 ALR 145.

Limitation applicable to action for consequential damage as result of taking or damaging of property for public use, 30 ALR 1190.

Right to interest in condemnation proceedings during owner's retention of possession, 32 ALR 98.

Right to compensation for improvements made under authority, or color thereof, by body having power of eminent domain, before exercise of that power, 34 ALR 1082.

Damage to property from proximity of cemetery as "damage" within constitutional provision against taking or damaging property without compensation, 36 ALR 527.

Changing location of railroad or street railway in street or highway as a taking or damaging for which compensation must be made, 46 ALR 1446.

Provision for taking or retaining possession pending appeal in condemnation proceeding, 55 ALR 201.

Right of abutting owner to compensation on widening of highway space for vehicle traffic, 55 ALR 896.

Liability of railroad company to property owner for change of grade incident to construction of overhead or underground crossing, 57 ALR 657.

Lack of diligence to contest a public use on ground that compensation has not been made for private property or rights as affecting right to relief, 58 ALR 681.

Are different estates or interests in real property taken under eminent domain to be valued separately, or is entire property to be valued as a unit and the amount apportioned among separate interests, 69 ALR 1263.

Right of tenant to remove buildings or other fixtures as affecting tenant's right to compensation in respect to such improvements in condemnation proceeding, 75 ALR 1495.

Power to condemn, or authorize the condemnation of, capital stock of a public utility, 81 ALR 1071.

Measure and items of compensation or damages for flooding property under the right of eminent domain, 106 ALR 955.

Building restriction as property right for taking of which compensation must be made, 122 ALR 1464.

Limitation applicable to action or proceeding by owner for compensation where property is taken in exercise of eminent domain without antecedent condemnation proceeding, 123 ALR 676.

Compensation for property confiscated or requisitioned during war, 137 ALR 1290.

Extraterritorial effect of confiscation of property and nationalization of corporations, 139 ALR 1209.

Compensation for property confiscated or requisitioned during war, 144 ALR 1506.

Rights of mortgagee in award in eminent domain proceedings, 154 ALR 1110.

Measure of compensation in eminent domain to be paid to state or municipality for taking of public highway or street, 160 ALR 955.

General governmental policy (distinguished from specific project) as affecting compensation allowable in eminent domain, 167 ALR 502.

Damage to private property caused by negligence of governmental agents as "taking," "damage," or "use" for public purposes, in constitutional sense, 2 ALR2d 677.

Unity or contiguity of properties essential to allowance of damages in eminent domain proceedings on account of remaining property, 6 ALR2d 1197.

Elements and measure of compensation in eminent domain for temporary use and occupancy, 7 ALR2d 1297.

Constitutional rights of owner as against destruction of building by public authorities, 14 ALR2d 73.

Eminent domain: elements and measure of compensation for oil or gas pipeline through private property, 38 ALR2d 788.

Municipal power to condemn land for cemetery, 54 ALR2d 1322.

Admissibility, in eminent domain proceeding, of evidence as to price paid for condemned real property during pendency of the proceeding, 55 ALR2d 781.

Admissibility, in eminent domain proceeding, of evidence as to price paid for condemned real property on sale prior to the proceeding, 55 ALR2d 791.

Cost to property owner of moving personal property as element of damages or compensation in eminent domain proceedings, 69 ALR2d 1453.

Measure of damages or compensation in eminent domain as affected by premises being restricted to particular educational, religious, charitable, or noncommercial use, 75 ALR2d 1382.

Counsel's use, in trial of condemnation proceeding, of chart, diagram or blackboard, not introduced in evidence, relating to damages or the value of the property condemned, 80 ALR2d 1270.

Interference with view as matter for consideration in eminent domain, 84 ALR2d 348.

Eminent domain: what constitutes sufficient attempt to agree on purchase or compensation, 90 ALR2d 211.

Valuation at time of original wrongful entry by condemnor or at time of subse-

quent initiation of condemnation proceedings, 2 ALR3d 1038.

Depreciation in value, from project for which land is condemned, as a factor in fixing compensation, 5 ALR3d 901.

Substitute condemnation: power to condemn property or interest therein to replace other property taken for public use, 20 ALR3d 862.

Admissibility of evidence of proposed or possible subdivision or platting of condemned land on issue of value in eminent domain proceedings, 26 ALR3d 780.

Rights and liabilities of parties to executory contract for sale of land taken by eminent domain, 27 ALR3d 572.

Award of, or pending proceedings for, compensation for property condemned, as precluding action for damages arising from prior trespasses upon it, 33 ALR3d 1132.

Eminent domain: cost of substitute facilities as measure of compensation paid to state or municipality for condemnation of public property, 40 ALR3d 143.

Abutting owner's right to damages for limitation of access caused by conversion of conventional road into limited-access highway, 42 ALR3d 13.

Measure and elements of damage for limitation of access caused by conversion of conventional road into limited-access highway, 42 ALR3d 148.

Measure of damages for condemnation of cemetery lands, 42 ALR3d 1314.

Traffic noise and vibration from highway as element of damages in eminent domain, 51 ALR3d 860.

Good will or "going concern" value as element of lessee's compensation for taking leasehold in eminent domain, 58 ALR3d 566.

Loss of liquor license as compensable in condemnation proceeding, 58 ALR3d 581.

Compensation for diminution in value of the remainder of property resulting from taking or use of adjoining land of others for the same undertaking, 59 ALR3d 488.

Eminent domain: consideration of fact that landowner's remaining land will be subject to special assessment in fixing severance damages, 59 ALR3d 534.

Eminent domain: condemnor's liability for costs of condemnee's expert witnesses, 68 ALR3d 546.

Eminent domain: determination of just compensation for condemnation of billboards or other advertising signs, 73 ALR3d 1122.

Good will as element of damages for condemnation of property on which private business is conducted, 81 ALR3d 198.

Compensation for interest prepayment penalty in eminent domain proceeding, 84 ALR3d 946.

Necessity of trial or proceeding separate from main condemnation trial or proceeding, to determine divided interest in state condemnation award, 94 ALR3d 696.

Eminent domain: right of owner of land not originally taken or purchased as part of adjacent project to recover, on enlargement of project to include adjacent land, enhanced value of property by reason of proximity to original land — state cases, 95 ALR3d 752.

Un sightliness of powerline or other wire, or related structure, as element of damages in easement condemnation proceeding, 97 ALR3d 587.

Eminent domain: recovery of value of improvements made with knowledge of impending condemnation, 98 ALR3d 504.

22-1-6. Right of persons to take or damage private property upon payment of just and adequate compensation.

If a person who is authorized to exercise the power of eminent domain cannot by contract procure the property or the easement, right of way, waterway, franchise, or other interest sought to be condemned, the person may take or damage the property or interest upon paying or tendering to the owner thereof just and adequate compensation. (Ga. L. 1894, p. 95, § 2; Civil Code 1895, § 4658; Civil Code 1910, § 5207; Code 1933, § 36-302.)

JUDICIAL DECISIONS

Eminent domain statutes must be strictly construed. — The taking or injuring of private property for the public benefit is the exercise of a high power, and all the conditions and limitations provided by law, under which it may be done, should be closely followed. Too much caution in this respect cannot be observed to prevent abuse and oppression. *Thomas v. City of Cairo*, 206 Ga. 336, 57 S.E.2d 192 (1950).

Private property cannot be taken for public uses, except under the forms and by due course of law. *Thomas v. City of Cairo*, 206 Ga. 336, 57 S.E.2d 192 (1950).

Appropriation of land without condemnation proceedings renders one a trespasser. *Postal Telegraph-Cable Co. v. Kuhn*, 127 Ga. 20, 55 S.E. 967 (1906).

Term "right of way" is limited by § 22-2-85, and does not imply the grant of the fee, so as to prevent the county from constructing a highway thereon. *Atlanta B. & A. Ry. v. County of Coffee*, 152 Ga. 432, 110 S.E. 214 (1921).

What direct and consequential damages are recoverable. — Damages, both direct and consequential, which are recoverable are those arising from construction from some visible and physical inference with a specific piece of property, or with some specific right or rise connected therewith and capable of exact description. *Austin v. Augusta*, Term. Ry., 108 Ga. 671, 34 S.E. 852, 47 L.R.A. 755 (1899).

Measure of damage is value of land taken and consequential damage, if any, to the remainder of the land. *State Hwy. Dep't v. Weldon*, 107 Ga. App. 98, 129 S.E.2d 396 (1962).

Condemnor has burden of proving what is just and adequate compensation for the property taken. *Georgia Power Co. v. Smith*, 94 Ga. App. 166, 94 S.E.2d 48 (1956).

And whether there has been consequential damage. — The condemnor has the burden of proving whether there has been consequential damage to the remaining

property and, if so, how much. *Georgia Power Co. v. Smith*, 94 Ga. App. 166, 94 S.E.2d 48 (1956).

Consequential damages include interference with the right of ingress and egress resulting from construction of public works. *Mallory v. Morgan County*, 131 Ga. 271, 62 S.E. 179 (1908).

Consequential damages to remaining property to be determined in separate suit. — The damages to the remainder of the property caused by negligence or trespass in the construction process may not be considered in a condemnation proceeding but must be determined in a separate lawsuit. *DeKalb County v. Cowan*, 151 Ga. App. 753, 261 S.E.2d 478 (1979).

Market value is true measure of compensation. — Where property is taken under power of eminent domain for a public use, its market value for all purposes for which the property is available is the true measure of the owner's compensation. *Georgia Power Co. v. Smith*, 94 Ga. App. 166, 94 S.E.2d 48 (1956).

Sales of similar property as evidence of value. — On a question in regard to the value of land sought to be condemned, it is competent to introduce evidence of sales of property similar to that in question, made at or near the time of the taking. The exact limit either of similarity or difference or of nearness or remoteness in point of time is difficult, if not impossible, to prescribe by any arbitrary rule, but must to a large extent depend on the location and the character of the property and the circumstances of the case; it is to be considered with reference to throwing light on the issue, and not as a mere method of raising a legal puzzle. *West v. Fulton County*, 95 Ga. App. 320, 97 S.E.2d 785 (1957).

Present and prospective value of condemned land as bridge site may be considered in determining damages. *Mitchell County v. Hudspeth*, 151 Ga. 767, 108 S.E. 305 (1921).

Correct measure of damage to one holding leasehold interest in land for over five years is the diminution in the market value of the premises for rent for the remainder of the term of the lease, that is, from the time of the damage till the end of

the lease. *Jones v. Richmond County*, 61 Ga. App. 857, 7 S.E.2d 754 (1940).

Failure to secure property by contract is prerequisite to condemnation. — Failure to secure the property by contract, by reason of the inability of the parties to agree upon the compensation to be paid therefor, is an essential prerequisite to the condemnation of private property for public uses. *City of Elberton v. Hobbs*, 121 Ga. 750, 49 S.E. 780 (1905).

Negotiations by a county authority, procuring right of way for roads in the name of the Department of Transportation (formerly State Highway Department) in an effort to agree with the owner of the property to be taken are not only authorized, but are required. *Miller v. State Hwy. Dep't*, 200 Ga. 485, 37 S.E.2d 365 (1946).

This section and § 22-1-7 require negotiation between the condemnor and condemnee and a failure to agree before condemnation proceedings can be instituted. *Cable v. State Hwy. Bd.*, 208 Ga. 593, 68 S.E.2d 564 (1952).

And condemnor must show that proper effort was made to procure land by contract from the owner prior to institution of the condemnation proceedings. *St. Clair v. State Hwy. Bd.*, 45 Ga. App. 488, 165 S.E. 297 (1932).

And failure to contract may be raised as objection on appeal. — An objection by a landowner filed on appeal from an award by assessors that there was no effort to contract with him will be heard. *Atlanta Terra Cotta Co. v. Georgia Ry. & Elec. Co.*, 132 Ga. 537, 64 S.E. 563 (1909).

Tender and refusal by owner of the fair value of property is sufficient negotiation. *Bridwell v. Gate City Term. Co.*, 127 Ga. 520, 56 S.E. 624, 10 L.R.A. (n.s.) 909 (1907).

Letter addressed to an executor personally, and not in his representative capacity will not authorize a city to condemn the property. *City of Atlanta v. Austell*, 146 Ga. 456, 91 S.E. 478 (1917).

Railroads may contract for property necessary to their operation. *Atlanta B. & A. Ry. v. County of Coffee*, 152 Ga. 432, 110 S.E. 214 (1921).

If landowner permits, without legal objection, public utility to appropriate his land to its necessary corporate use until

such becomes a necessary and constituent part of its service to the public, the landowner, not for the protection so much of the company but for the benefit of the public, will be estopped from recovering the land in ejectment or from enjoining its use for the service, but will, if he moves in time, be remitted to an appropriate action for damages. *Georgia Power Co. v. Kelly*, 182 Ga. 33, 184 S.E. 861 (1936).

Ordinance allowing city to refuse property and payment held invalid. — City ordinance which provides for the condemnation of property, with the proviso that the city might refuse to accept the property or to pay the award of the as-

sessors if the amount, manner of payment, and terms thereof were not satisfactory to the city, is invalid and city would be enjoined from proceeding thereunder. *Thomas v. City of Cairo*, 206 Ga. 336, 57 S.E.2d 192 (1950).

Cited in *Western Union Tel. Co. v. Western & A.R.R.*, 142 Ga. 532, 83 S.E. 135 (1914); *Hoch v. Candler*, 190 Ga. 390, 9 S.E.2d 622 (1940); *United States v. A Certain Tract or Parcel of Land*, 44 F. Supp. 712 (S.D. Ga. 1942); *State Hwy. Dep't Whitehurst*, 106 Ga. App. 532, 127 S.E.2d 501 (1962); *State Hwy. Dep't v. Hilliard*, 112 Ga. App. 498, 145 S.E.2d 824 (1965).

OPINIONS OF THE ATTORNEY GENERAL

Damages measured by fair market value of property. — Ordinarily, when an entire parcel of property is taken, or an entire leasehold interest is taken, the measure of the damages is the "market value" of the land or leasehold interest as the case might be; market value has been defined as the price which may be paid by one wishing but not required to buy, to one wishing but not required to sell. 1958-59 Op. Att'y Gen. p. 271.

But owner's recovery not restricted to market value. — The constitutional and statutory provisions as to just and adequate compensation does not necessarily restrict the owner's recovery to market value; the owner is entitled to the value of the property to him, not its value to the state. 1958-59 Op. Att'y Gen. p. 271.

Fair and reasonable value of property as measure of damages. — The measure of damages for property taken by the right of eminent domain, being compensatory in its nature, is the pecuniary loss sustained by the owner, taking into consideration all

relevant factors; this loss may be represented by the fair and reasonable value of the property taken if the market value would not coincide with the actual value thereof. 1958-59 Op. Att'y Gen. p. 271.

Costs of removing personal or business property from real estate. — The cost of moving personal property from real estate which is taken for public purposes cannot be considered as an element of damage, as such; however, the cost of removal of either fixtures, buildings, or personalty, especially when used for business purposes, may be considered as one of the factors entering into a determination of the value of the real estate to the condemnee from whom it is taken. 1958-59 Op. Att'y Gen. p. 271.

Reimbursement of utility companies relocated due to interstate highway construction. — Utility companies whose facilities must be relocated or reconstructed by reason of the construction of any segment of the Interstate Highway System must be reimbursed therefor. 1958-59 Op. Att'y Gen. p. 184.

RESEARCH REFERENCES

Am. Jur. 2d. — 26 Am. Jur. 2d, Eminent Domain, §§ 150-166, 170-177. 27 Am. Jur. 2d, Eminent Domain, §§ 247-261, 266-278, 387-389.

C.J.S. — 29A C.J.S., Eminent Domain, §§ 96-205, 222, 224.

ALR. — Expense of building and maintaining fences as element in the determination of damages in eminent domain, 10 ALR 451.

Compensation in second eminent domain proceeding, 18 ALR 569.

Right under constitutional provision against taking or damaging, to recover in other than an eminent domain proceeding, for consequential damages to property no part of which is taken, 20 ALR 516.

Changing location of railroad or street railway in street or highway as a taking or damaging for which compensation must be made, 46 ALR 1446.

Damages in eminent domain as affected by actual or potential value of riparian rights in connection with other property, 58 ALR 796.

Measure of damages or compensation where property is taken to widen street, 64 ALR 1513.

Are different estates or interests in real property taken under eminent domain to be valued separately, or is entire property to be valued as a unit and the amount apportioned among separate interests, 69 ALR 1263; 166 ALR 1211.

Conveyance as passing right to proceeds of condemnation proceedings pending at time of conveyance, 82 ALR 1063.

Measure and items of compensation or damages for flooding property under the right of eminent domain, 106 ALR 955.

Right of owner or occupant of property to damages, and measure and elements thereof, because of temporary closing or obstruction during repairs or reconstruction of street or highway, under statutes in the regard, 120 ALR 896.

Limitation applicable to action or proceeding by owner for compensation where property is taken in exercise of eminent domain without antecedent condemnation proceeding, 123 ALR 676.

Elements and measure of compensation for power lines or other wire lines over private property, 124 ALR 407.

Distinction between income or profits from business on land and income or profits from use of land, as affecting admissibility of evidence in that regard on question of damages in eminent domain, 134 ALR 1125.

Rights in respect of proceeds of an award in eminent domain proceedings made after mortgage foreclosure sale, 170 ALR 272.

Damage to private property caused by negligence of governmental agents as "taking," "damage," or "use" for public purposes, in constitutional sense, 2 ALR2d 677.

Unity or contiguity of properties essential to allowance of damages in eminent domain proceedings on account of remaining property, 6 ALR2d 1197.

Compensation for, or extent of rights acquired by, taking of land, as affected by condemner's promissory statements as to character of use or undertakings to be performed by it, 7 ALR2d 364.

Elements and measure of compensation in eminent domain for temporary use and occupancy, 7 ALR2d 1297.

Eminent domain: elements and measure of compensation for oil or gas pipeline through private property, 38 ALR2d 788.

Abutting owner's right to damages or other relief for loss of access because of limited-access highway or street, 43 ALR2d 1072.

Admissibility, in eminent domain proceeding, of evidence as to price paid for condemned real property during pendency of the proceeding, 55 ALR2d 781.

Admissibility, in eminent domain proceeding, of evidence as to price paid for condemned real property on sale prior to the proceeding, 55 ALR2d 791.

Liability of public utility to abutting owner for destruction or injury of trees in or near highway or street, 64 ALR2d 866.

Cost to property owner of moving personal property as element of damages or compensation in eminent domain proceedings, 69 ALR2d 1453.

Counsel's use, in trial of condemnation proceeding, of chart, diagram or blackboard, not introduced in evidence, relating to damages or the value of the property condemned, 80 ALR2d 1270.

Rights in condemnation award where land taken was subject to possible rights of reverter or reentry, 81 ALR2d 568.

Right to damages or compensation upon condemnation of property, of holder of unexercised option to purchase, 85 ALR2d 588.

Eminent domain: what constitutes sufficient attempt to agree on purchase or compensation, 90 ALR2d 211.

Changes in purchasing power of money as affecting compensation in eminent domain proceedings, 92 ALR2d 772.

Valuation at time of original wrongful entry by condemnor or at time of subsequent initiation of condemnation proceedings, 2 ALR3d 1038.

Depreciation in value, from project for which land is condemned, as a factor in fixing compensation, 5 ALR3d 901.

Substitute condemnation: power to condemn property or interest therein to replace other property taken for public use, 20 ALR3d 862.

Rights and liabilities of parties to executory contract for sale of land taken by eminent domain, 27 ALR3d 572.

Award of, or pending proceedings for, compensation for property condemned, as precluding action for damages arising from prior trespasses upon it, 33 ALR3d 1132.

Eminent domain: cost of substitute facilities as measure of compensation paid to state or municipality for condemnation of public property, 40 ALR3d 143.

Traffic noise and vibration from highway as element of damages in eminent domain, 51 ALR3d 860.

Loss of liquor license as compensable in condemnation proceeding, 58 ALR3d 581.

Good will or "going concern" value as element of lessee's compensation for taking leasehold in eminent domain, 58 ALR3d 566.

Eminent domain: determination of just compensation for condemnation of billboards or other advertising signs, 73 ALR3d 1122.

Good will as element of damages for condemnation of property on which private business is conducted, 81 ALR3d 198.

Compensation for interest prepayment penalty in eminent domain proceedings, 84 ALR3d 946.

Un sightliness of powerline or other wire, or related structure, as element of damages in easement condemnation proceeding, 97 ALR3d 587.

Eminent domain: recovery of value of improvements made with knowledge of impending condemnation, 98 ALR3d 504.

22-1-7. Effect of failure to agree on compensation.

If the parties cannot agree upon the compensation to be paid, the same shall be assessed and determined as provided in Article 1 of Chapter 2 of this title. (Ga. L. 1894, p. 95, § 3; Civil Code 1895, § 4659; Civil Code 1910, § 5208; Code 1933, § 36-303.)

JUDICIAL DECISIONS

Eminent domain statutes must be strictly construed. — The taking or injuring of private property for the public benefit is the exercise of a high power, and all the conditions and limitations provided by law, under which it may be done, should be closely followed. Too much caution in this respect cannot be observed to prevent abuse and oppression. *Thomas v. City of Cairo*, 206 Ga. 336, 57 S.E.2d 192 (1950).

Private property cannot be taken for public uses, except under the forms and by due course of law. *Thomas v. City of Cairo*, 206 Ga. 336, 57 S.E.2d 192 (1950).

Sole question to be passed upon is amount of compensation. — In a pro-

ceeding under this section, the sole question to be passed upon by the assessors, or a jury in the superior court on appeal, is the amount of compensation to be paid. *Atlantic & B.R.R. v. Penny*, 119 Ga. 479, 46 S.E. 665 (1904).

Compensation must be paid before property is taken. — In eminent domain proceedings the property owner must be paid just and adequate compensation before his property is taken. *Thomas v. City of Cairo*, 206 Ga. 336, 57 S.E.2d 192 (1950).

Negotiations with property owner required. — Negotiations by a county authority, procuring right of way for roads in the name of the Department of Trans-

portation (formerly State Highway Department) in an effort to agree with the owner of the property to be taken are not only authorized, but are required. *Miller v. State Hwy. Dep't*, 200 Ga. 485, 37 S.E.2d 365 (1946).

This section and § 22-1-6 require nego-

tiation between the condemnor and condemnnee and a failure to agree before condemnation proceedings can be instituted. *Cable v. State Hwy. Bd.*, 208 Ga. 593, 68 S.E.2d 564 (1952).

Cited in *Barber v. Housing Auth.*, 189 Ga. 155, 5 S.E.2d 425 (1939).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Eminent Domain, §§ 387-389.

C.J.S. — 29A C.J.S., Eminent Domain, § 224.

ALR. — Eminent domain: elements and measure of compensation for oil or gas pipeline through private property, 38 ALR2d 788.

Eminent domain: what constitutes suffi-

cient attempt to agree on purchase or compensation, 90 ALR2d 211.

Mandamus to compel ascertainment of compensation for property taken or for injuries inflicted under the power of eminent domain, 91 ALR2d 991.

Good will as element of damages for condemnation of property on which private business is conducted, 81 ALR3d 198.

22-1-8. Exclusive nature of title.

All persons authorized to take or damage private property for public purposes shall proceed as set forth in this title. (Ga. L. 1894, p. 95, § 1; Civil Code 1895, § 4657; Civil Code 1910, § 5206; Code 1933, § 36-301.)

JUDICIAL DECISIONS

Second application for condemnation. — Where an application for condemnation is filed, and no steps are taken thereunder and it is abandoned, a new application may be made without reference to the abandoned application. *Hutchinson v. Copeland*, 146 Ga. 357, 91 S.E. 206 (1917).

Injunction against condemnation. — The court grants an injunction against condemnation where it is shown that the plaintiff had made a bona fide selection of the right of way sought to be condemned. *Western & A.R.R. v. Western Union Tel. Co.*, 138 Ga. 420, 75 S.E. 471, 42 L.R.A. (n.s.) 225 (1912); *Nashville C. & S.L. Ry. v. Western Union Tel. Co.*, 142 Ga. 525, 83 S.E. 123 (1914).

Appropriation or damage for public purposes. — It is only where property has been appropriated or damaged by the erection and maintenance of a public improvement that the owner can recover upon the theory that his property has been

appropriated or damaged for public purposes. *Rhines v. Commissioners of Chatham County*, 50 Ga. App. 844, 179 S.E. 140 (1935).

Law prescribing condemnation procedure incorporated by implication in municipal charter. — Where city charter declared that city would have full power and authority to condemn property for the purpose of opening new streets to be exercised in the manner provided in this section and § 22-2-61(a), which taken alone do not provide a method, the general law of the state prescribing the procedure and the method of ascertaining damages became by implication a part of the municipal charter. *Glidden Co. v. City of Collins*, 189 Ga. 656, 7 S.E.2d 266 (1940).

Cited in *Fleming v. City of Rome*, 130 Ga. 383, 61 S.E. 5 (1908); *Western & A.R.R. v. Western Union Tel. Co.*, 138 Ga. 420, 75 S.E. 471, 42 L.R.A. (n.s.) 225 (1912); *Willcox v. State Hwy. Bd.*, 38 Ga.

App. 373, 144 S.E. 214 (1928); *Central of Ga. Ry. v. Thomas*, 167 Ga. 110, 144 S.E. 739 (1928); *H.G. Hastings Co. v. Southern Natural Gas Corp.*, 173 Ga. 212, 159 S.E. 853 (1931); *State Hwy. Bd. v. Shierling*, 51 Ga. App. 935, 181 S.E. 885 (1935); *Harrison v. State Hwy. Dep't*, 183 Ga. 290, 188 S.E. 445 (1936); *State Hwy. Bd. v. Long*, 61 Ga. App. 173, 6 S.E.2d 130 (1939); *Hoch v. Candler*, 190 Ga. 390, 9 S.E.2d 622 (1940); *United States v. A Certain Tract or Parcel of Land*, 44 F. Supp. 712 (S.D. Ga. 1942); *Marist Soc'y v. City of Atlanta*, 212 Ga. 115, 90 S.E.2d 564 (1955); *Combs v. State Hwy. Dep't*, 111 Ga. App. 132, 140 S.E.2d 892 (1965).

RESEARCH REFERENCES

C.J.S. — 25A C.J.S., Damages, § 2.

CONDEMNATION PROCEDURE GENERALLY

CHAPTER 2

CONDEMNATION PROCEDURE GENERALLY

Article 1

Proceeding Before Assessors

PART 1

GENERAL PROVISIONS

Sec.

22-2-1. "Condemnor" defined.

PART 2

NOTICE OF CONDEMNATION

22-2-20. Persons entitled to receive notice generally.

22-2-21. Direction of notice where owner a minor or under disability; appointment of guardian ad litem.

22-2-22. Serving notice on trustees of trust property and remaindermen.

22-2-23. Direction of notice where owner or personal representative a nonresident; representation by judge of the probate court of nonresident owners, etc., whose addresses are unknown.

22-2-24. Direction of notice where owner unknown or where unknown remaindermen possible; right of owner to second assessment upon his appearance; return of surplus award to condemnor.

22-2-25. Manner and time of service.

22-2-26. Contents of notice.

PART 3

SELECTION AND OATH OF ASSESSORS

22-2-40. Selection of assessors generally.

22-2-41. Selection of assessor by judge of the probate court where owners or their representatives fail to select an assessor, where owner unknown, etc.; selection of assessor by clerk of superior court where judge of the probate court disqualified; rights of owners in selecting assessor.

22-2-42. Failure of parties' nominees to select third assessor.

Sec.

22-2-43. Oath of assessors.

PART 4

HEARING

22-2-60. Fixing of time for hearing by assessors; notification of parties.

22-2-61. Power of assessors to subpoena and to compel attendance; right of parties to be represented.

22-2-62. Evidence to be heard by assessors generally.

22-2-63. Manner of assessment.

22-2-64. Entry of findings by assessors.

22-2-65. Filing and recording of award.

PART 5

APPEALS AND FINAL JUDGMENT

22-2-80. Appeal to jury in superior court — Generally.

22-2-81. Same — Effect of appeal on condemnor's right to use condemned property or interest; payment, tender, etc., of award as condition on condemnor's right to use property or interest.

22-2-82. Same — Effect of tender, payment, or acceptance of assessors' award on right of appeal; effect of discrepancy between award and final judgment.

22-2-83. Issuance of execution on award or judgment.

22-2-84. Entry of notice and award on minutes of court; payments to assessors by condemnor; payment of other costs by assessors; exemption of state, etc., from operation of Code section.

22-2-85. Extent of interest obtainable by condemnor upon condemnation.

22-2-86. Manner of payment where owner a minor or under disability and without a legal representative.

EMINENT DOMAIN

Article 2

Proceeding Before Special Master

Sec.

- 22-2-100. "Condemning body" and "condemnor" defined.
- 22-2-101. Effect of article on other methods of condemnation; intent of article.
- 22-2-102. Filing of petition of condemnation; order for parties to appear before special master, make known their rights or interests, etc.; time of hearing before special master; directions for notice and service thereof; attachment of process to petition; cause to proceed in rem.
- 22-2-103. Appointment of special master — Generally.
- 22-2-104. Same — Form to be used in appointing special master.
- 22-2-105. Same — Oath of special master.
- 22-2-106. Compensation of special master; allowance by judge of reasonable time for special master to inspect premises.
- 22-2-107. Service of process; award by special master and judgment of court conclusive as to right of condemnor to take or damage property or interest.
- 22-2-108. Powers and duties of special master generally.
- 22-2-109. Factors to be considered in determining or estimating just and adequate compensation; determination of date of taking; inclusion of date of approval of original location of highway in petition for condemnation; newspaper advertisement as to original location of highway, date of location, etc.
- 22-2-110. Award of special master — Time of filing; award to become part of record of proceedings; vesting of title in condemnor upon deposit of award into court; form of award; use of special master's findings and award in subsequent appeal.
- 22-2-111. Same — Incorporation of award into judgment of court.
- 22-2-112. Same — Appeal of award generally.

Sec.

- 22-2-113. Same — Effect of tender, payment, or acceptance of award on right of appeal; right of owners of separate and distinct parcels to file separate appeal; effect of discrepancy between award of special master and verdict of jury; issuance of execution upon award or judgment.
- 22-2-114. Effect of deposit of award into court registry; conflicting claims as to deposit.

Article 3

Proceeding Before Court

- 22-2-130. Authority to petition superior court for judgment in rem.
- 22-2-131. Contents of petition.
- 22-2-132. Order to appear, etc.; directions for notice and service thereof; attachment of process to petition; cause to proceed as in rem.
- 22-2-133. Service of process — Generally.
- 22-2-134. Same — Discretion of judge to cause additional notice or service to be given; notification of tax collector or tax commissioner.
- 22-2-135. Appointment of assessors; discretion of judge to have issues tried in first instance by jury.
- 22-2-136. Appeal from assessors' award.
- 22-2-137. Factors to be considered in determining or estimating just and adequate compensation; determination of date of taking; inclusion of date of approval of original location of highway in petition for condemnation; newspaper advertisement as to original location of highway, date of location, etc.
- 22-2-138. Scope of award or verdict; molding of award or verdict; power of court to adjudge condemnation of title upon deposit of amount of award or verdict into court; disposition of award by court.
- 22-2-139. Right of interested persons to intervene; effect of subsequent proceedings on rights of condemnor.

CONDEMNATION PROCEDURE GENERALLY

Sec.

22-2-140. Notification of court by tax collector or tax commissioner of taxes due on property or interest; actions by court to discharge lien.

22-2-141. Filing and recording of award, decree, and description of

Sec.

condemned property or interest or copies thereof; payment of fees to clerk of superior court.

22-2-142. Intent of article regarding effect on other methods of condemnation.

Cross references. — As to procedure for obtaining private ways, see § 44-9-40 et seq.

Law reviews. — For comment on *Georgia Power Co. v. Fountain*, 207 Ga. 361, 61 S.E.2d 454 (1950), see 13 Ga. B.J.

341 (1951). For comment on *State Hwy. Dep't v. Owens*, 120 Ga. App. 647, 171 S.E.2d 770 (1969), and the right to inquire as to property owner's knowledge of condemnation prior to making improvements, see 22 Mercer L. Rev. 616 (1971).

JUDICIAL DECISIONS

Only public necessity can justify taking of private property. — The right of the humblest individual in the enjoyment of his property must be protected. The right to take private property from the owner for public use often works extreme hardship and savors of oppression. Nothing but a public necessity can justify it, and then only in strict conformity with the law. *Williams v. City of La Grange*, 213 Ga. 241, 98 S.E.2d 617 (1957).

Condemnor chooses its method of procedure, and it is bound by the provisions of law following its own election. The property owner is also bound, although he did not choose the method of procedure. *Johnson v. Fulton County*, 103 Ga. App. 873, 121 S.E.2d 54 (1961).

Amendment of notice of condemnation proceedings is perfectly proper where its allowance does not adversely and substantially affect the condemnee's rights. *Taylor v. Georgia Power Co.*, 129 Ga. App. 89, 198 S.E.2d 701 (1973).

Condemnor has burden of proving land value and consequential damages. — The burden of proof to show the value of the land taken and the consequential damages to the remaining property, if any, is on the condemnor. *State Hwy. Dep't v. Smith*, 111 Ga. App. 292, 141 S.E.2d 590 (1965).

Sole question for assessors or jury is amount of compensation. — Where proceedings are instituted for the purpose of

acquiring property for public purposes, the sole question which may be passed upon by the appointed assessors, or by a jury on appeal, is the amount of compensation to be paid to one whose property is being taken by the condemning authorities. Since the legislature has not expressly provided any method whereby the property owner can contest the question of public necessity or the right of condemnation, the property owner is left without a legal remedy and must resort to an independent action in a court of equity for relief. *Williams v. City of La Grange*, 213 Ga. 241, 98 S.E.2d 617 (1957); *B. & W. Hen Farm, Inc. v. Georgia Power Co.*, 222 Ga. 830, 152 S.E.2d 841 (1966).

The sole power of the assessors provided by Article 2 of this chapter relates to the value of the property taken and to no other question. *City of Carrollton v. Walker*, 215 Ga. 505, 111 S.E.2d 79 (1959).

In condemnation cases, the sole question for the consideration of the jury, upon an appeal from an award of the assessors or from an award of a special master, is the amount of compensation to be paid to the condemnee for the property taken under the condemnation proceeding and the amount of damages to the remaining property of the condemnee, if any. *State Hwy. Dep't v. Smith*, 111 Ga. App. 292, 141 S.E.2d 590 (1965).

Appeal from award of assessors is de novo investigation, and the defendant in such proceedings may file an appropriate legal defense thereto. *City of Macon v. Ries*, 179 Ga. 320, 176 S.E. 21 (1934).

An appeal from the award of assessors in a condemnation proceeding under the provisions of this chapter is a de novo investigation, and the defendant may file appropriate pleadings and defenses therein as in other suits. *Georgia Power Co. v. Lightfoot*, 97 Ga. App. 330, 103 S.E.2d 99 (1958).

This chapter does not provide for intervention by any person claiming interest in property, whether or not such person was served with notice. *Mitchell v. State Hwy. Dep't*, 216 Ga. 517, 118 S.E.2d 88 (1961).

Statutory construction where procedural provisions incomplete. — Where wording is taken from a prior statute, or

where Article 2 of this chapter fails to be complete within itself, then reference to provisions for proceedings before assessors is permitted to fill in the void. *Johnson v. Fulton County*, 103 Ga. App. 873, 121 S.E.2d 54 (1961).

Contesting validity of condemnation proceedings. — Where a property owner participates in proceedings but refuses to take the award of the assessors, and where the property owner acted promptly after the award of the assessors was made by filing his petition in equity, alleging that the condemnor was proceeding illegally and had no right to condemn, and sought to enjoin the entering upon or taking possession of his property, the property owner is not estopped from contesting the validity of the condemnation proceedings. *Johnston v. Clayton County Water Auth.*, 222 Ga. 39, 148 S.E.2d 417 (1966).

OPINIONS OF THE ATTORNEY GENERAL

Date of taking is date of special master's or assessor's award. 1970 Op. Att'y Gen. No. 70-116.

Appraiser should be instructed to update appraisal to date of hearing before special master; this appraisal should contemplate that the amount of the award will

be paid into court by condemnor within ten days of such hearing by the special master, and this is the amount that the appraiser should be prepared to testify to if and when there is an appeal of the matter to a jury in the superior court by either party thereto. 1970 Op. Att'y Gen. No. 70-116.

RESEARCH REFERENCES

ALR. — Expense of flagmen, gates, and automatic signals as items of compensation to railroad company across whose tracks a highway is laid, 4 ALR 137.

Eminent domain: rights of one having inchoate right to dower, 5 ALR 1347.

Liability upon abandonment of eminent domain proceedings for loss or expenses incurred by property owner, 31 ALR 352.

Depreciation of property by location of school as taking or damaging within constitutional provision, 48 ALR 1031.

Damages resulting from temporary conditions incident to a public improvement as a taking or damaging within constitutional provision, 68 ALR 340.

Constitutionality of statute which permits consideration of enhanced value of

lands not taken, in fixing compensation for property taken or damaged in exercise of eminent domain, 68 ALR 784.

Constitutionality of provisions as to tribunal which shall fix the amount of compensation for taking of property in eminent domain, otherwise than objections that a trial by jury is necessary, 74 ALR 569.

Right to compensation in eminent domain on basis of entire extent of property or complete use ultimately contemplated in excess of present requirements, 75 ALR 855.

Right of tenant to remove buildings or other fixtures as affecting tenant's right to compensation in respect to such improvements in condemnation proceeding, 75 ALR 1495.

Right of owner of dominant estate to have compensation for taking of easement by eminent domain determined with reference to land and improvements held in the dominant estate, 98 ALR 640.

Right to abandon and effect of abandonment of eminent domain proceedings, 121 ALR 12.

Special value or adaptability of property for purpose for which it is taken, as an element of, or matter for consideration in fixing, damages in condemnation proceedings, 124 ALR 910.

Distinction between income or profits from business on land and income or profits from use of land, as affecting admissibility of evidence in that regard on question of damages in eminent domain, 134 ALR 1125.

Increment to value, from project for which land is condemned, as a factor in fixing compensation, 147 ALR 66.

Eminent domain: valuation of land and improvements and fixtures thereon separately or as unit, 1 ALR2d 878.

Elements and measure of lessee's compensation for taking or damaging leasehold in eminent domain, 3 ALR2d 286.

Constitutional rights of owner as against destruction of building by public

authorities, 14 ALR2d 73.

Attorney's fees as within statute imposing upon condemnor liability for "expenses," "costs," and the like, 26 ALR2d 1295.

Abutting owner's right to damages or other relief for loss of access because of limited-access highway or street, 43 ALR2d 1072.

Compensation or damages for condemning a public utility plant, 68 ALR2d 392.

Distribution as between life tenant and remainderman of proceeds of condemned property, 91 ALR2d 963.

Condemnor's right, as against condemnee, to interest on excessive money deposited in court or paid to condemnee, 99 ALR2d 886.

Depreciation in value, from project for which land is condemned, as a factor in fixing compensation, 5 ALR3d 901.

Necessity of trial or proceeding separate from main condemnation trial or proceeding to determine divided interest in state condemnation award, 94 ALR3d 696.

Unsightliness of powerline or other wire, or related structure, as element of damages in easement condemnation proceeding, 97 ALR3d 587.

ARTICLE 1

PROCEEDING BEFORE ASSESSORS

JUDICIAL DECISIONS

This article is constitutional, although no special tribunal to pass on the question of necessity is provided for. *Savannah F. & W. Ry. v. Postal Telegraph-Cable Co.*, 115 Ga. 554, 42 S.E. 1 (1902).

This article is general in its nature and applies to all persons, natural and artificial, who come within its purview. *Savannah, F. & W. Ry. v. Postal Telegraph-Cable Co.*, 115 Ga. 554, 42 S.E. 1 (1902).

This article provides method to be followed when private property is taken or damaged for public purposes, and the procedure herein prescribed cannot be

adopted when the property is sought to be taken for a purely private purpose. *Garbutt Lumber Co. v. Georgia & A. Ry.*, 111 Ga. 714, 36 S.E. 942 (1900); *Jones & Co. v. Venable*, 120 Ga. 1, 47 S.E. 549, 1 Ann. Cas. 185 (1904).

This article changed prior law enunciated in *Parham v. Justices of Inferior Court*, 9 Ga. 341 (1851), requiring a special act to authorize condemnation. *Marietta Chair Co. v. Henderson*, 121 Ga. 399, 49 S.E. 312, 104 Am. St. R. 156, 2 Ann. Cas. 83 (1904).

And prior laws are superseded. — All prior laws providing different method of

procedure for taking property under the power of eminent domain are superseded by this article. *Alexander v. City Council*, 134 Ga. 849, 68 S.E. 704 (1910); *Bibb Brick Co. v. Central of Ga. Ry.*, 151 Ga. 83, 105 S.E. 833 (1921).

Act permitting municipality to condemn land in fee simple is unconstitutional. *O'Dowd's Sons Co. v. Augusta*, 141 Ga. 748, 82 S.E. 148 (1914).

Power granted by charter not affected. — The power granted the Georgia Railroad & Banking Company to condemn private property in the manner prescribed in its original charter as amended by the Act approved December 26, 1836 (Prince's Dig. 358), could not legally be, and was not affected by the passage of this article. *Gardner v. Georgia R.R. & Banking Co.*, 117 Ga. 522, 43 S.E. 863 (1903).

Power delegated to municipality. — If the power of eminent domain is conferred on the municipality by its charter, and no provision is made therein for its exercise, the general law embodied in this article is by implication a part of the law delegating the power. *Stowe v. Town of Newborn*, 127 Ga. 421, 56 S.E. 516 (1907). See *Georgia R.R. & Banking Co. v. Mayor of Union Point*, 119 Ga. 809, 47 S.E. 183 (1904); *Zachry v. Mayor of Harlem*, 138 Ga. 195, 75 S.E. 4 (1912).

State property not subject to condemnation. — Statutes providing for condemnation of land for public use do not provide that they shall apply to the state, nor is there anything to imply that the Legislature intended such statutes to be applicable to the sovereign. *Western Union Tel. Co. v. Western & A.R.R.*, 142 Ga. 532, 83 S.E. 135 (1914).

Nor is interest of lessee of state property subject to condemnation. *Western Union Tel. Co. v. Western & A.R.R.*, 142 Ga. 532, 83 S.E. 135 (1914).

Consent of property owner not necessary. — In condemnation proceedings authorized by this article, the willingness or unwillingness of the property owner to part with his property is not a subject matter of consideration. *Central Ga. Power Co. v.*

Mays, 137 Ga. 120, 72 S.E. 900 (1911).

Assessors need not be county residents. — It is not necessary that assessors appointed in condemnation proceeding under this article should be residents of the county where such proceeding is instituted. *Hutchinson v. Copeland*, 146 Ga. 357, 91 S.E. 206 (1917).

Power of condemnation may be exercised by railroad whose tracks cross the tracks of another. *Atlantic & B.R.R. v. Seaboard Air-Line Ry.*, 116 Ga. 412, 42 S.E. 761 (1902).

Person or corporation engaged in quarrying business, who needs right of way for private railroad across the lands of others, is authorized in a case of necessity to obtain the right of way by condemnation proceedings. *Jones & Co. v. Venable*, 120 Ga. 1, 47 S.E. 549, 1 Ann. Cas. 185 (1904).

Contesting validity of condemnation proceedings. — Where a property owner participates in proceedings but refuses to take the award of the assessors, and where the property owner acted promptly after the award of the assessors was made by filing his petition in equity, alleging that the condemnor was proceeding illegally and had no right to condemn, and sought to enjoin the entering upon or taking possession of his property, the property owner is not estopped from contesting the validity of the condemnation proceedings. *Johnston v. Clayton County Water Auth.*, 222 Ga. 39, 148 S.E.2d 417 (1966).

Statutory construction where procedural provisions incomplete. — Where wording is taken from a prior statute, or where Article 2 of this chapter fails to be complete within itself, then reference to provisions for proceedings before assessors is permitted to fill in the void. *Johnson v. Fulton County*, 103 Ga. App. 873, 121 S.E.2d 54 (1961).

Cited in *Mitchell County v. Hudspeth*, 151 Ga. 767, 108 S.E. 305 (1921); *Ainslee v. County of Morgan*, 151 Ga. 82, 105 S.E. 836 (1921); *Commissioners of Decatur County v. Curry*, 154 Ga. 378, 114 S.E. 341 (1922).

PART 1

GENERAL PROVISIONS

22-2-1. “Condemnor” defined.

As used in this article, the term “condemnor” means any person or corporation which has been authorized by the General Assembly to exercise the power of eminent domain.

PART 2

NOTICE OF CONDEMNATION

Cross references. — As to service of process generally, see § 9-11-4.

22-2-20. Persons entitled to receive notice generally.

Any person seeking to condemn property for public purposes shall serve a notice of condemnation on the owner of the property or of any remainder, reversion, mortgage, lease, security deed, or other interest therein. (Ga. L. 1894, p. 95, § 4; Civil Code 1895, § 4660; Civil Code 1910, § 5209; Code 1933, § 36-304.)

JUDICIAL DECISIONS

Statutory requirements as to service must be observed. — A condemnation proceeding under the power of eminent domain, even if it be considered as an action in rem, is a statutory proceeding, and statutory requirements as to service must be observed. *Chattooga County v. Scott*, 215 Ga. 68, 108 S.E.2d 876 (1959).

Notice must describe property with same definiteness as deed. — Preliminary to the exercise of power of eminent domain for the purpose of opening a public street it is incumbent upon the city to serve a notice upon the owner of the property sought to be condemned, which shall describe the property, with the same definiteness as is required in a deed of conveyance of land. *Glidden Co. v. City of Collins*, 189 Ga. 656, 7 S.E.2d 266 (1940).

Preliminary to the exercise of the power granted by § 22-3-20, for the purpose of

erecting an electric line with necessary poles and fixtures, it is incumbent upon the power company to serve a notice on the owner of the property sought to be condemned, which notice shall describe the property with the same definiteness as is required in a deed of conveyance of land. *Gunn v. Georgia Power Co.*, 205 Ga. 85, 52 S.E.2d 449 (1949).

Assessor to be appointed by hearing date fixed in notice. — Construing together this section and §§ 22-2-25(a), 22-2-26, and 22-2-41, the landowner has until the day fixed for the hearing in the notice in which to appoint his assessor, which hearing shall not be less than 15 days from the time of serving the notice. A different ruling is not required by the decision in *City of Elberton v. Adams*, 130 Ga. 501, 61 S.E. 18 (1908). *Sheppard v. City of Edison*, 161 Ga. 907, 132 S.E. 218 (1926).

Notice cannot be amended while matter is before assessors. *Nashville, C. & S.L. Ry. v. Western Union Tel. Co.*, 142 Ga. 525, 83 S.E. 123 (1914).

Amendment reducing amount of property from fee simple to easement is permitted on appeal. *Georgia G.R.R. v. Venable*, 129 Ga. 341, 58 S.E. 864 (1907).

Judgment void where owner not named or served. — Where the owner is not named or served in a three-appraiser proceeding, and neither acknowledges nor waives service, a judgment rendered in such proceeding is void, though the court had jurisdiction of the subject matter. *Department of Transp. v. Garrett*, 154 Ga. App. 104, 267 S.E.2d 643 (1980).

Mistake as to identity of owner does not absolutely void proceeding. — In rem proceedings involving eminent domain takings, where there has been an error as to the true owner of the property such that the true owner has not in fact been given notice and an opportunity to be heard, will not absolutely void a completed pro-

ceeding, and the true owner cannot have the judgment set aside, but is relegated to a claim in personam based on his right to compensation. *Department of Transp. v. Garrett*, 154 Ga. App. 104, 267 S.E.2d 643 (1980).

Unauthorized notice given by president of corporation cannot be ratified by directors. *Bridwell v. Gate City Term. Co.*, 127 Ga. 520, 56 S.E. 624, 10 L.R.A. (n.s.) 909 (1907).

Notice held sufficient. — A notice which stated that condemnor was a corporation of this state, and proposed to use the property for railway purposes and that the property was necessary for public purposes, is sufficient. *Central of Ga. Ry. v. Bibb Brick Co.*, 149 Ga. 83, 99 S.E. 126 (1919).

Cited in *Central of Ga. Ry. v. Thomas*, 167 Ga. 110, 144 S.E. 739 (1928); *Ammons v. Central of Ga. Ry.*, 215 Ga. 758, 113 S.E.2d 438 (1960); *Robinson v. Transcontinental Gas Pipe Line Corp.*, 306 F. Supp. 201 (N.D. Ga. 1969).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Eminent Domain, § 393.

C.J.S. — 29A C.J.S., Eminent Domain, §§ 196-204, 236, 242-244.

ALR. — Protection of rights of mortgagee in eminent domain proceedings, 58 ALR 1534.

Protection of rights of mortgagee in eminent domain proceedings, 110 ALR 542.

Right to damages or compensation upon condemnation of property, of holder of

unexercised option to purchase, 85 ALR2d 588.

Validity, construction, and effect of specific provision of lease or statute relating to rights and compensation of lessee in event of condemnation, 96 ALR2d 1140.

Rights and liabilities of parties to executory contract for sale of land taken by eminent domain, 27 ALR3d 572.

22-2-21. Direction of notice where owner a minor or under disability; appointment of guardian ad litem.

(a) If the owner of the property or of any interest therein is a minor or under any disability whatsoever, notice of condemnation shall be served upon his personal representative.

(b) If there is no personal representative, notice shall be served personally on the minor and on the judge of the probate court of the county where the property or interest is located. The judge shall thereupon appoint a guardian ad litem to represent the minor in the litigation.

(c) If the judge of the probate court is disqualified, by reason of interest or other cause, notice shall be served on the clerk of the superior court of the county where the property or interest is located, who shall appoint a guardian ad litem to represent the minor. (Ga. L. 1894, p. 95, §§ 5-7; Civil Code 1895, §§ 4661, 4662, 4663; Civil Code 1910, §§ 5210, 5211, 5212; Code 1933, §§ 36-305, 36-306, 36-307.)

RESEARCH REFERENCES

C.J.S. — 29A C.J.S., Eminent Domain, § 204, 243. tion of real property of infant or incompetent as real or personal property, 90 ALR 897.

ALR. — Proceeds of sale or condemna-

22-2-22. Serving notice on trustees of trust property and remaindermen.

If the property or interest sought to be condemned is held in trust or if the condemnation is directed toward property in which remainders have been created, notice shall be served on the trustee and on any persons who have an interest under the conveyance. (Ga. L. 1894, p. 95, § 8; Civil Code 1895, § 4664; Civil Code 1910, § 5213; Code 1933, § 36-308.)

RESEARCH REFERENCES

ALR. — Protection of rights of mortgagee in eminent domain proceedings, 58 ALR 1534.

22-2-23. Direction of notice where owner or personal representative a nonresident; representation by judge of the probate court of nonresident owners, etc., whose addresses are unknown.

If the owner of the property or of any interest therein or the personal representative of any owner resides out of the state, notice shall be served on the person in possession of the property or interest. Notice shall also be served on the nonresident owner or owners or the nonresident personal representative as provided in Code Section 32-3-9. If the address of the owner or owners or of the personal representative is not known, the judge of the probate court of the county where the property or interest is located shall act for such nonresident owners in the manner provided for unrepresented minors in Code Section 22-2-21. (Ga. L. 1894, p. 95, § 9; Civil Code 1895, § 4665; Civil Code 1910, § 5214; Code 1933, § 36-309.)

JUDICIAL DECISIONS

Statutory requirements as to service must be observed. — A condemnation proceeding under the power of eminent domain, even if it be considered as an action in rem, is a statutory proceeding, and statutory requirements as to service

must be observed. *Chattooga County v. Scott*, 215 Ga. 68, 108 S.E.2d 876 (1959).

Cited in *Whitney v. Central Ga. Power Co.*, 134 Ga. 213, 67 S.E. 197, 19 Ann. Cas. 982 (1910).

RESEARCH REFERENCES

C.J.S. — 72 C.J.S., Process, §§ 43 et seq., 73, 74.

ALR. — Eminent domain: permissible

modes of service of notice of proceedings, 89 ALR2d 1404.

22-2-24. Direction of notice where owner unknown or where unknown remaindermen possible; right of owner to second assessment upon his appearance; return of surplus award to condemnor.

If the owner of the property or of any interest therein is unknown or if there is a possibility of unborn remaindermen having an interest, notice shall be served on the person in actual possession of the property or interest and also on the judge of the probate court of the county where the property or interest is located, who shall act for the unknown owner as provided for unrepresented minors in Code Section 22-2-21, provided that, whenever the unknown owner may appear, he may ask for and have another assessment under the terms of this title and he shall receive the amount then assessed. If the second assessment is less than the first, the judge of the probate court shall return the surplus to the person originally condemning. (Ga. L. 1894, p. 95, § 10; Civil Code 1895, § 4666; Civil Code 1910, § 5215; Code 1933, § 36-310.)

JUDICIAL DECISIONS

Cited in *City of Cartersville v. Sloan*, 105 Ga. App. 754, 125 S.E.2d 522 (1962).

RESEARCH REFERENCES

C.J.S. — 72 C.J.S., Process, § 43 et seq.

ALR. — Are different estates or interests in real property taken under eminent domain to be valued separately, or is entire property to be valued as a unit and the amount apportioned among separate interests, 69 ALR 1263.

Rights in condemnation award where land taken was subject to possible rights of reverter or reentry, 81 ALR2d 568.

Distribution as between life tenant and remainderman of proceeds of condemned property, 91 ALR2d 963.

22-2-25. Manner and time of service.

(a) Unless service is acknowledged or waived, a copy of the notice of condemnation shall be served by a sheriff or deputy at least 15 days before the day fixed for assessing the damage either:

(1) Personally on the owner of the property or other interest or on the representative of any owner or on any other person entitled to service;

(2) By leaving a copy of the notice at the residence of the owner, representative, or other person entitled to service; or

(3) In the case of an owner, representative, or other person entitled to service who is a nonresident, by mailing a copy to that person's last known address.

(b) In cases where service cannot be effected by leaving notice at place of residence or by personal service:

(1) Fifteen days before the day fixed for assessing the damages, the sheriff shall post the notice at the door of the courthouse of the county where the property or interest is located; and

(2) One week before the day fixed for assessing the damages, the sheriff shall cause the notice to be published once in the official organ of the county. (Ga. L. 1894, p. 95, §§ 11, 12; Civil Code 1895, §§ 4667, 4668; Civil Code 1910, §§ 5216, 5217; Code 1933, §§ 36-311, 36-312; Ga. L. 1966, p. 248, § 1.)

JUDICIAL DECISIONS

Assessor to be appointed by hearing date fixed in notice. — Construing together subsection (a) of this section and §§ 22-2-20, 22-2-26, and 22-2-41, the landowner has until the day fixed for the hearing in the notice in which to appoint his assessor, which hearing shall not be less

than 15 days from the time of serving the notice. A different ruling is not required by the decision in *City of Elberton v. Adams*, 130 Ga. 501, 61 S.E. 18 (1908). *Sheppard v. City of Edison*, 161 Ga. 907, 132 S.E. 218 (1926).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Eminent Domain, § 394.

C.J.S. — 29A C.J.S., Eminent Domain, §§ 245-249. 72 C.J.S., Process, §§ 43 et seq., 73, 74.

ALR. — Eminent domain: permissible modes of service of notice of proceedings, 89 ALR2d 1404.

22-2-26. Contents of notice.

(a) All notices shall be directed to the owner of the property or of any interest therein and shall:

(1) Describe the property or franchise and the amount of interest therein sought to be condemned;

(2) Fix the time when the hearing will be had on the premises;

(3) Give the name of the assessor selected by the person seeking condemnation; and

(4) Request the owner or owners, the trustee, or the representative, as the case may be, to select an assessor.

(b) If the owner is unknown, the notice shall be directed to "all persons having any interest in the property located at _____ (description of location of property)." (Ga. L. 1894, p. 95, § 13; Civil Code 1895, § 4669; Civil Code 1910, § 5218; Code 1933, § 36-313.)

JUDICIAL DECISIONS

Notice must describe property with same definiteness as deed. — Preliminary to the exercise of power of eminent domain for the purpose of opening a public street it is incumbent upon the city to serve a notice upon the owner of the property sought to be condemned, which shall describe the property, with the same definiteness as is required in a deed of conveyance of land. *Glidden Co. v. City of Collins*, 189 Ga. 656, 7 S.E.2d 266 (1940).

Preliminary to the exercise of the power granted by § 22-3-20, for the purpose of erecting an electric line with necessary poles and fixtures, it is incumbent upon the power company to serve a notice on the owner of the property sought to be condemned, which notice shall describe the property with the same definiteness as is required in a deed of conveyance of land. *Gunn v. Georgia Power Co.*, 205 Ga. 85, 52 S.E.2d 449 (1949).

The notice of an intention to condemn an easement in property which must be given under this section requires the condemnor to describe the property in

which an easement is to be acquired with the same degree of definiteness as is required in a deed to land. *B. & W. Hen Farm, Inc. v. Georgia Power Co.*, 222 Ga. 830, 152 S.E.2d 841 (1966); *City of Atlanta v. Airways Parking Co.*, 225 Ga. 173, 167 S.E.2d 145 (1969).

Notice to secure easement of flowage held sufficient. — See *Central Ga. Power Co. v. Maddox*, 135 Ga. 246, 69 S.E. 109 (1910).

Assessor to be appointed by hearing date fixed in notice. — Construing together this section and §§ 22-2-20, 22-2-25(a), and 22-2-41, the landowner has until the day fixed for the hearing in the notice in which to appoint his assessor, which hearing shall not be less than 15 days from the time of serving the notice. A different ruling is not required by the decision in *City of Elberton v. Adams*, 130 Ga. 501, 61 S.E. 18 (1908); *Sheppard v. City of Edison*, 161 Ga. 907, 132 S.E. 218 (1926).

Cited in *Harrison v. State Hwy. Dep't*, 183 Ga. 290, 188 S.E. 445 (1936); *Hoch v. Candler*, 190 Ga. 390, 9 S.E.2d 622 (1940).

RESEARCH REFERENCES

- Am. Jur. 2d.** — 27 Am. Jur. 2d, Eminent Domain, § 394. §§ 243, 244. 30 C.J.S., Eminent Domain, §§ 292-294. 72 C.J.S., Process, §§ 43 et seq., 73, 74.
- C.J.S.** — 29A C.J.S., Eminent Domain,

PART 3

SELECTION AND OATH OF ASSESSORS

JUDICIAL DECISIONS

Condemnor chooses its method of procedure, and it is bound by the provisions of law following its own election. The property owner is also bound, although he did not choose the method of procedure. *Johnson v. Fulton County*, 103 Ga. App. 873, 121 S.E.2d 54 (1961).

Statutory construction where procedural provisions incomplete. — Where wording is taken from a prior statute, or where Art. 2 of this chapter fails to be complete within itself, then reference to the

provisions for proceedings before assessors is permitted to fill in the void. *Johnson v. Fulton County*, 103 Ga. App. 873, 121 S.E.2d 54 (1961).

Cited in *United States v. A Certain Tract or Parcel of Land*, 47 F. Supp. 30 (S.D. Ga. 1942); *Minsk v. Fulton County*, 83 Ga. App. 520, 64 S.E.2d 336 (1951); *State Hwy. Dep't v. Hendrix*, 215 Ga. 821, 113 S.E.2d 761 (1960); *Mitchell v. State Hwy. Dep't*, 216 Ga. 517, 118 S.E.2d 88 (1961).

22-2-40. Selection of assessors generally.

The condemnor and the condemnee shall each select an assessor, and the two assessors so selected shall select a third assessor.

22-2-41. Selection of assessor by judge of the probate court where owners or their representatives fail to select an assessor, where owner unknown, etc.; selection of assessor by clerk of superior court where judge of the probate court disqualified; rights of owners in selecting assessor.

(a) If any party to the condemnation notifies the judge of the probate court of the county where the property or interest is located that the owner of the property has failed to select an assessor, or that the owners or their representatives have failed to agree on an assessor, or that the owner is unknown, or that the owner or any one of the owners is a minor or otherwise under disability and without legal representative, the judge of the probate court shall select an assessor for such owners or representatives. If the judge of the probate court is disqualified, the clerk of the superior court of the county shall make the selection after like notice.

(b) All persons having any interest in the property sought to be condemned shall have equal rights in the selection of an assessor. (Ga. L. 1894, p. 95, § 14; Civil Code 1895, § 4670; Civil Code 1910, § 5219; Code 1933, § 36-401.)

JUDICIAL DECISIONS

Owner of land should have reasonable time after service of notice within which to select assessor. City of Elberton v. Adams, 130 Ga. 501, 61 S.E. 18 (1908).

Assessor to be appointed by hearing date fixed in notice. — Construing together this section and §§ 22-2-20, 22-2-25(a), and 22-2-26, the landowner has until the day fixed for the hearing in the notice in which to appoint his assessor, which hearing shall not be less than 15 days from the time of serving the notice. A different ruling is not required by the decision in City of Elberton v. Adams, 130 Ga.

501, 61 S. E. 18 (1908). Sheppard v. City of Edison, 161 Ga. 907, 132 S.E. 218 (1926).

It is not essential that assessors be residents of county where proceeding is instituted. Hutchinson v. Copeland, 146 Ga. 357, 91 S.E. 206 (1917).

Cited in Patterson v. State Hwy. Dep't, 201 Ga. 860, 41 S.E.2d 260 (1947); Gilmore v. Sandersville R.R., 149 F. Supp. 725 (M.D. Ga. 1955); Miller v. Georgia Power Co., 222 Ga. 239, 149 S.E.2d 479 (1966); James v. Housing Auth., 233 Ga. 447, 211 S.E.2d 738 (1975).

RESEARCH REFERENCES

C.J.S. — 30 C.J.S., Eminent Domain, §§ 292-294.

22-2-42. Failure of parties' nominees to select third assessor.

If the two assessors selected by the condemnor and the condemnee do not agree upon a third assessor within five days after the selection of the second assessor, the judge of the superior court of the county where the property or interest is situated shall, upon application of either party, of which the other shall have notice, make the selection. (Ga. L. 1894, p. 95, § 15; Civil Code 1895, § 4671; Civil Code 1910, § 5220; Code 1933, § 36-402.)

JUDICIAL DECISIONS

Cited in Gilmore v. Sandersville R.R., 149 F. Supp. 725 (M.D. Ga. 1955).

RESEARCH REFERENCES

C.J.S. — 30 C.J.S., Eminent Domain, §§ 292-294.

22-2-43. Oath of assessors.

The three assessors thus selected shall be sworn by some officer authorized to administer an oath "to do equal and exact justice between the parties according to law." (Ga. L. 1894, p. 95, § 16; Civil Code 1895, § 4672; Civil Code 1910, § 5221; Code 1933, § 36-403.)

JUDICIAL DECISIONS

No requirement that oath be taken before notice sent to condemnee. — There is no statutory provision requiring that the oath required by this section be taken before sending out the notice to the condemnee of the time and place when a hearing will be held. *Landers v. Georgia*

Pub. Serv. Comm'n, 217 Ga. 804, 125 S.E.2d 495 (1962).

Cited in *Jones v. Faulkner*, 101 Ga. App. 547, 114 S.E.2d 542 (1960); *State Hwy. Dep't v. King*, 107 Ga. App. 220, 129 S.E.2d 577 (1963).

RESEARCH REFERENCES

C.J.S. — 30 C.J.S., Eminent Domain, § 295.

PART 4

HEARING

JUDICIAL DECISIONS

Eminent domain statutes must be strictly construed. — The taking or injuring of private property for the public benefit is the exercise of a high power, and all the conditions and limitations provided by this section, under which it may be done, should be closely followed. Too much caution in this respect cannot be observed to prevent abuse and oppression. *City of Cartersville v. Long*, 105 Ga. App. 762, 125 S.E.2d 539 (1962).

Burden of proving value of land and consequential damages on condemnor. — The burden of proof to show the value of

the land taken and the consequential damages to the remaining property, if any, is on the condemnor. *State Hwy. Dep't v. Smith*, 111 Ga. App. 292, 141 S.E.2d 590 (1965).

Owner seeking injunction not estopped from naming assessor. — A property owner who files a petition to enjoin condemnation proceedings, alleging that the condemnor is proceeding illegally and had no right to condemn, is not estopped from maintaining his equitable petition by his participation thereafter in the condemnation proceedings by the naming of an assessor, where he has refused the award of

the assessors. *Johnston v. Clayton County Water Auth.*, 222 Ga. 39, 148 S.E.2d 417 (1966).

Compensation the sole issue for jury on appeal. — In condemnation cases, the sole question for the consideration of the jury, upon an appeal from an award of the assessors or from an award of a special master, is the amount of compensation to be paid to the condemnee for the property taken under the condemnation proceeding

and the amount of damages to the remaining property of the condemnee, if any. *State Hwy. Dep't v. Smith*, 111 Ga. App. 292, 141 S.E.2d 590 (1965).

Cited in *United States v. A Certain Tract or Parcel of Land*, 47 F. Supp. 30 (S.D. Ga. 1942); *State Hwy. Dep't v. Hendrix*, 215 Ga. 821, 113 S.E.2d 761 (1960); *Mitchell v. State Hwy. Dep't*, 216 Ga. 517, 118 S.E.2d 88 (1961).

OPINIONS OF THE ATTORNEY GENERAL

Date of taking is date of special master's or assessor's award. 1970 Op. Att'y Gen. No. 70-116.

Appraisal to be updated to date of hearing before special master. — When condemnation is necessary, the appraiser should be instructed to update his appraisal to the date of the hearing before the special master; this appraisal should contemplate

that the amount of the award will be paid into court by condemnor within ten days of such hearing by the special master, and this is the amount that the appraiser should be prepared to testify to if and when there is an appeal of the matter to a jury in the Superior Court by either party thereto. 1970 Op. Att'y Gen. No. 70-116.

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Eminent Domain, §§ 375-380, 409-411.

C.J.S. — 30 C.J.S., Eminent Domain, §§ 276-280, 292-305.

ALR. — Loss of right to contest assessment in proceeding for street or sewer improvement by waiver, estoppel, or the like, 9 ALR 634.

Loss of right to contest assessment in drainage proceeding by waiver, estoppel, or the like, 9 ALR 842.

Right to abandon and effect of abandonment of eminent domain proceedings, 121 ALR 12.

Increment to value, from project for which land is condemned, as a factor in fixing compensation, 147 ALR 66.

Abutting owner's right to damages or other relief for loss of access because of limited-access highway or street, 43 ALR2d 1072.

Admissibility, in eminent domain proceeding, of evidence as to price paid for condemned real property during pendency of the proceeding, 55 ALR2d 781.

Admissibility, in eminent domain pro-

ceeding, of evidence as to price paid for condemned real property on sale prior to the proceeding, 55 ALR2d 791.

Right of adjoining landowners to intervene in condemnation proceedings on ground that they might suffer consequential damage, 61 ALR2d 1292.

Right of tenant to remove buildings or other fixtures as affecting tenant's right to compensation in respect to such improvements in condemnation proceeding, 75 ALR 1495.

Mandamus to compel ascertainment of compensation for property taken or for injuries inflicted under the power of eminent domain, 91 ALR2d 991.

Liability, upon abandonment of eminent domain proceedings, for loss or expenses incurred by property owner, or for interest on award or judgment, 92 ALR2d 355.

Right to open and close argument in trial of condemnation proceedings, 73 ALR2d 618.

Good will as element of damages for condemnation of property on which private business is conducted, 81 ALR3d 198.

22-2-60. Fixing of time for hearing by assessors; notification of parties.

If by reason of delay in appointing assessors or other cause the hearing cannot be conducted at the time fixed in the original notice, the assessors shall fix the time for the hearing and shall notify the parties in writing of the time and place of the hearing. (Ga. L. 1894, p. 95, § 17; Civil Code 1895, § 4673; Civil Code 1910, § 5223; Code 1933, § 36-501.)

JUDICIAL DECISIONS

Condemnor may dismiss proceedings before award has been made. Central Ga. Power Co. v. Nolan, 135 Ga. 443, 69 S.E. 561 (1910).

Cited in Patterson v. State Hwy. Dep't, 201 Ga. 860, 41 S.E.2d 260 (1947); James v. Housing Auth., 233 Ga. 447, 211 S.E.2d 738 (1975).

RESEARCH REFERENCES

C.J.S. — 30 C.J.S., Eminent Domain, § 296.

22-2-61. Power of assessors to subpoena and to compel attendance; right of parties to be represented.

(a) The assessors shall have the same power to issue subpoenas and compel the attendance of witnesses as is vested in the superior court.

(b) Parties may be represented in person or by attorney before the assessors. (Ga. L. 1894, p. 95, §§ 18, 30; Civil Code 1895, §§ 4674, 4686; Civil Code 1910, §§ 5222, 5224; Code 1933, §§ 36-502, 36-503.)

JUDICIAL DECISIONS

Cited in Glidden Co. v. City of Collins, 189 Ga. 656, 7 S.E.2d 266 (1940); O.K., Inc. v. State Hwy. Dep't, 213 Ga. 666, 100

S.E.2d 906 (1957); Kellett v. Fulton County, 215 Ga. 551, 111 S.E.2d 364 (1959).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Eminent Domain, § 420.

C.J.S. — 30 C.J.S., Eminent Domain, § 296.

ALR. — Right in eminent domain proceeding to call as witness expert engaged but not called as witness by opposing party, 71 ALR3d 1119.

22-2-62. Evidence to be heard by assessors generally.

(a) The assessors shall hear all evidence offered by either party as to the value of the property or of any interest therein to be taken or used, the damages incurred by the owner of the property or of any interest therein, and the benefits to the owner accruing from the use of the property or interest by the condemnor.

(b) Prospective and consequential damages resulting from the taking may be considered if such damages are plain and appreciable.

(c) The increase of the value of the property or of any interest therein resulting from the proposed public improvement may be considered, but in no case shall such estimated increase deprive the owner of actual damages.

(d) In the estimation of the value of the property or other interest taken for public uses, such valuation need not be restricted to the agricultural or productive qualities of the property or interest, but inquiry may be made as to all other legitimate purposes to which the property or interest could be appropriated. (Orig. Code 1863, §§ 622, 623; Code 1868, §§ 686, 687; Code 1873, §§ 647, 648; Code 1882, §§ 647, 648; Ga. L. 1894, p. 95, § 18; Civil Code 1895, §§ 567, 568, 4674; Civil Code 1910, §§ 688, 689, 5224; Code 1933, §§ 36-503, 36-505, 36-506.)

Law reviews. — For comment on State Hwy. Dep't v. Thomas, 106 Ga. App. 849, 128 S.E.2d 520 (1962), see 14 Mercer L. Rev. 447 (1963).

JUDICIAL DECISIONS**ANALYSIS****GENERAL CONSIDERATION****VALUE OF PROPERTY TAKEN****1. IN GENERAL****2. VALUE FOR ALL PURPOSES****3. UNIQUE PROPERTY****4. COMPARABLE SALES AND OFFERS OF PURCHASE****PROSPECTIVE AND CONSEQUENTIAL DAMAGES****General Consideration**

Owner entitled to compensation for land taken and for damage to remaining land. — When a county, in the exercise of its corporate powers, appropriates land of an individual, and as a result the premises of the owner are rendered less valuable, he is entitled to just compensation for the land so taken, and also for the injury thus sustained. *Terrell County v. York*, 127 Ga. 166, 56 S.E. 309 (1906).

In condemnation proceedings the condemnor is liable not only for direct damages for the actual land taken for the public use, but in addition thereto for all consequential damages which naturally and proximately flow from the taking of the land to the remainder of the parcel or tract of land not taken as tend to diminish its market value. *Georgia Power Co. v. McCrea*, 46 Ga. App. 279, 167 S.E. 542 (1933).

There are only two elements of damages to be considered in a condemnation proceeding: first, the market value of the property actually taken; second, the consequential damage that will naturally and proximately arise to the remainder of the owner's property from the taking of the part which is taken and the devoting of it to the purposes for which it is condemned. *Simon v. Department of Transp.*, 245 Ga. 478, 265 S.E.2d 777 (1980).

Law allows damages to property not actually appropriated in an eminent domain proceeding as consequential damages if such damages are shown. *Justice v. State Hwy. Dep't*, 100 Ga. App. 794, 112 S.E.2d 307 (1959).

Remote and speculative or possible damages are not allowed. *McCrea v. Georgia Power Co.*, 46 Ga. App. 276, 167 S.E. 540 (1933).

Remote or merely speculative or possible damages are not allowed in considering the value of the land taken nor consequential damage to the land not taken. *Southern Ry. v. Miller*, 94 Ga. App. 701, 96 S.E.2d 297 (1956).

The uses which may be considered in determining damages must be so reasonably probable as to have an effect on the present market value of the land; a purely imaginative or speculative value cannot be considered. *State Hwy. Dep't v. Howard*, 119 Ga. App. 298, 167 S.E.2d 177 (1969).

Anything that actually enhances value of land must be considered in order to meet the constitutional demand that the owner be paid, before the taking, adequate and just compensation. *Department of Transp. v. Arnold*, 154 Ga. App. 502, 268 S.E.2d 775 (1980).

Assessment of compensation covers all damages which result from proper construction, whether those damages were foreseen or not. *Whipple v. County of Houston*, 214 Ga. 532, 105 S.E.2d 898 (1958).

It cannot be assumed in condemnation proceedings that there will be negligent construction or operation of the project so as to cause damage in excess of that which would naturally and proximately result from the construction and operation

thereof. *McCrea v. Georgia Power Co.*, 46 Ga. App. 276, 167 S.E. 540 (1933).

Contiguity of parcels does not render the aggregate a tract. — The mere contiguity of several parcels of land belonging to one owner does not in itself render the lots in the aggregate an entire tract. *Gaines v. City of Calhoun*, 42 Ga. App. 89, 155 S.E. 214 (1930).

Platting and subdivision does not necessarily destroy unity of tract. — The mere platting of a tract of land and its subdivision into vacant building lots does not necessarily destroy the oneness or unity of the entire property. *Gaines v. City of Calhoun*, 42 Ga. App. 89, 115 S.E. 214 (1930).

Burden of proof is upon the condemnor, where the property has been taken or damaged, to establish by a preponderance of the evidence what amount of money constitutes just and adequate compensation. *State Hwy. Bd. v. Shierling*, 51 Ga. App. 935, 181 S.E. 885 (1935).

Only issue before assessors or jury on appeal is amount of compensation to be paid, and neither the assessors nor a jury can determine whether the condemnor is proceeding legally; the remedy of the landowners is to apply to a court of equity to enjoin the illegal proceedings. *Garden Parks v. Fulton County*, 88 Ga. App. 97, 76 S.E.2d 31 (1953).

Jurors are not absolutely bound to accept as correct opinions or estimates of witnesses as to the value of property, though uncontradicted by other testimony, but have the right to consider the nature of the property involved, together with any other fact or circumstance properly within their knowledge, throwing light upon the question, and they may, by their verdict, fix either a lower or a higher value upon the property than that stated in the opinions or estimates of the witnesses. *Southern v. Cobb County*, 78 Ga. App. 58, 50 S.E.2d 226 (1948).

Charge substantially in the language of this section and § 22-2-63 was not error. *State Hwy. Bd. v. Coleman*, 78 Ga. App. 54, 50 S.E.2d 262 (1948).

Cited in Glidden Co. v. City of Collins, 189 Ga. 656, 7 S.E.2d 266 (1940); *State Hwy. Dep't v. Peavy*, 77 Ga. App. 308, 48

S.E.2d 478 (1948); *Housing Auth. v. McDonald*, 87 Ga. App. 392, 74 S.E.2d 113 (1953); *Georgia Power Co. v. Pittman*, 92 Ga. App. 673, 89 S.E.2d 577 (1955); *Kellett v. Fulton County*, 215 Ga. 551, 111 S.E.2d 364 (1959); *O.K., Inc. v. State Hwy. Dep't*, 213 Ga. 666, 100 S.E.2d 906 (1957); *United States v. Ivie*, 163 F. Supp. 138 (N.D. Ga. 1957); *Kellett v. Fulton County*, 215 Ga. 551, 111 S.E.2d 364 (1959); *Georgia Power Co. v. Faulk*, 102 Ga. App. 141, 115 S.E.2d 733 (1960); *Southwell v. State Hwy. Dep't*, 104 Ga. App. 479, 122 S.E.2d 131 (1961); *Fulton County v. Bailey*, 107 Ga. App. 512, 130 S.E.2d 800 (1963); *State Hwy. Dep't v. Kaylor*, 110 Ga. App. 46, 137 S.E.2d 664 (1964); *City of Jefferson v. Maddox*, 116 Ga. App. 51, 156 S.E.2d 553 (1967); *State Hwy. Dep't v. Cantrell*, 119 Ga. App. 241, 166 S.E.2d 604 (1969); *Pye v. State Hwy. Dep't*, 226 Ga. 389, 175 S.E.2d 510 (1970); *State Hwy. Dep't v. American Oil Co.*, 125 Ga. App. 260, 187 S.E.2d 303 (1972); *Department of Transp. v. Knight*, 143 Ga. App. 748, 240 S.E.2d 90 (1977).

Value of Property Taken

1. In General

Market value of land for all available purposes is true measure of compensation. — Where property is taken under power of eminent domain for a public use, its market value for all purposes for which the property is available is the true measure of the owner's compensation, the value of the property to the condemnor for the specific purpose for which the property is taken is not the basis for measuring the amount of compensation payable to the owner. *State Hwy. Bd. v. Shierling*, 51 Ga. App. 935, 181 S.E. 885 (1935).

Definition of market value of property. — Market value of property is what it will bring when sold for cash by a person ready and willing to sell, but under no obligation to sell, and when bought by a person ready and willing to buy, but under no obligation to buy. *Housing Auth. v. Spink*, 91 Ga. App. 72, 85 S.E.2d 80 (1954).

There are three recognized techniques for determining market value: replacement cost new less depreciation, income, and comparable sales. *Housing Auth. v. Southern Ry.*, 245 Ga. 229, 264 S.E.2d 174 (1980).

Lost profits may be used as means of awarding just and adequate compensation because the income approach necessarily takes into account what future earnings would be were the property interest not extinguished. *Housing Auth. v. Southern Ry.*, 245 Ga. 229, 264 S.E.2d 174 (1980).

Improvements on land are proper subjects for independent valuation in consideration of the just and adequate compensation for the total property taken. *Department of Transp. v. Brooks*, 153 Ga. App. 386, 265 S.E.2d 610 (1980).

Existing zoning regulations can be pertinent in a condemnation proceeding. *Department of Transp. v. Brooks*, 153 Ga. App. 386, 265 S.E.2d 610 (1980).

Condemnee can recover compensation for loss of use of his property during period of construction by the county, based on its rental value during that time, if the jury first finds that a loss of use had occurred and that the condemnee had taken reasonable steps to avoid such loss. *DeKalb County v. Cowan*, 151 Ga. App. 753, 261 S.E.2d 478 (1979).

Ascertaining value of land taken by subtracting value of land remaining from value of whole land before taking is error, since this permits the consideration of consequential damages or benefits in arriving at the value of the land remaining and may thus work harm to either the condemnor or the condemnee. *Fulton County v. Power*, 109 Ga. App. 783, 137 S.E.2d 474 (1964).

Evidence held inadmissible to show value of condemnee's property. — Evidence by a witness for the condemnee that an unspecified number of undescribed parcels of property in a block adjacent to that wherein was located the land sought to be condemned sold for a specified average price per square foot was inadmissible to show the value of the condemnee's property. *Fulton County v. Cox*, 99 Ga. App. 743, 109 S.E.2d 849 (1959).

As to effect of moving old road, and establishing new, as increasing and decreasing value, see *Mallory v. Morgan County*, 131 Ga. 271, 62 S.E. 179 (1908).

2. Value for All Purposes

Prospective value of land for any purpose may be considered. — In arriving

at the value of the land taken under condemnation proceedings, the value of the land, including its prospective value for any purpose, may be considered. *Georgia Power Co. v. Carson*, 46 Ga. App. 612, 167 S.E. 902 (1933); *State Hwy. Bd. v. Coleman*, 78 Ga. App. 54, 50 S.E.2d 262 (1948).

All elements and uses of the land may be taken into consideration to determine the market value of the land taken and the consequential damages to the land not taken. However, under this sort of procedure, a witness may not be permitted to testify separately as to the value of each element. *Southern Ry. v. Miller*, 94 Ga. App. 701, 96 S.E.2d 297 (1956).

Including value for specific use for which condemnor takes land. — The availability of property for the specific use for which it was taken and to which it is put by the condemnor is an element to be considered in estimating the value to the owner for all purposes for which the property is available. *State Hwy. Bd. v. Shierling*, 51 Ga. App. 935, 181 S.E. 885 (1935).

And regardless of probability that other uses will be made of land. — This section clearly states that the suitability of land for other uses, and not the probability that other uses will be made of the land, is the criterion for estimating the value of condemned land. *Moore v. State Hwy. Dep't*, 221 Ga. 392, 144 S.E.2d 747 (1965); *State Hwy. Dep't v. Howard*, 119 Ga. App. 298, 167 S.E.2d 177 (1969).

The test for estimating the value of land under this section is whether the land sought to be condemned could be used for other purposes, and not whether the land would be used for other purposes. *Schoolcraft v. DeKalb County*, 126 Ga. App. 101, 189 S.E.2d 915 (1972).

The test is whether the land is legitimately usable for other purposes, not whether such use is certain. Possible future uses will not influence the present market value of a tract unless there is a demand for such uses or they are otherwise reasonably probable. *Georgia Power Co. v. Cole*, 141 Ga. App. 806, 234 S.E.2d 382 (1977).

Use of charge allowing consideration of other uses of land. — Absent any evidence authorizing the jury to find that property being condemned was suitable for other

uses or from which it might reasonably infer its suitability for other uses, a charge that the jury might, in estimating its fair market value, consider other uses to which it might be devoted was error. *State Hwy. Dep't v. Whitehurst*, 109 Ga. App. 737, 137 S.E.2d 371 (1964), later appeal, 112 Ga. App. 877, 146 S.E.2d 919 (1966).

Evidence insufficient to require charge on valuation for all purposes. — Where 3.673 acres of a 40-acre tract of land plus a small drainage area was being condemned by the state highway department, evidence that all of the 40 acres, except about two acres where the owner's home stood, was in improved pasture, and part of the land taken was a narrow strip along a road on which the dwelling house of the owner faced, does not authorize an inference that the land taken was suitable for purposes other than agricultural so as to authorize a charge based on subsection (d) of this section. *State Hwy. Dep't v. Cronin*, 114 Ga. App. 348, 151 S.E.2d 486 (1966).

Failure to give instruction on valuation for all purposes held erroneous. — Where there is some testimony that the condemned land is residential property and that there is an apartment complex and commercial property in the immediate vicinity it is error to refuse to give an instruction on valuation of the property for all purposes when requested in writing. *Schoolcraft v. DeKalb County*, 126 Ga. App. 101, 189 S.E.2d 915 (1972).

There is no error in charging subsection (d) verbatim although there was no evidence of "agricultural qualities" of the property. *DeKalb County v. Queen*, 135 Ga. App. 307, 217 S.E.2d 624 (1975).

3. Unique Property

Unique value is pecuniary value of certain property to its present owner, in a situation where he can find no other property equally well suited to his use, and there is no taker on the open market at the pecuniary value of the property to him. In such a case there is no market value, which presupposes a willing-buyer willing-seller situation. *Housing Auth. v. Troncalli*, 111 Ga. App. 515, 142 S.E.2d 93 (1965).

Since valuing property at its fair market value presupposes a willing buyer and a willing seller, properties are "unique" such

that fair market value will not afford just and adequate compensation when they are not of a type generally bought or sold in the open market. *Housing Auth. v. Southern Ry.*, 245 Ga. 229, 264 S.E.2d 174 (1980).

Whether or not property is unique is a jury question. *Dixie Hwy. Bottle Shop, Inc. v. Department of Transp.*, 150 Ga. App. 839, 258 S.E.2d 646 (1979); *Department of Transp. v. Dixie Hwy. Bottle Shop, Inc.*, 245 Ga. 314, 265 S.E.2d 10 (1980).

"Unique" property is measured by variety of nonfair market methods of valuation, including the cost and income methods. *Housing Auth. v. Southern Ry.*, 245 Ga. 229, 264 S.E.2d 174 (1980).

Recovery beyond fair market value for property of unique value. — The measure of the condemnee's recovery is the fair market value of the property taken, and a condemnee can only recover for the value that the property has to him over and above fair market value in such cases where the evidence shows that the property had some unique and special economic, not merely sentimental, value to the condemnee alone. *Fulton County v. Cox*, 99 Ga. App. 743, 109 S.E.2d 849 (1959).

Where there is some evidence tending to show that the property to be taken has a unique suitability, due to its location, for the purpose to which it was being put, it is not error to instruct the jury that they are not restricted to market value in determining just and adequate compensation. *DeKalb County v. Cowan*, 151 Ga. App. 753, 261 S.E.2d 478 (1979).

Generally, fair market value of the property will be the fair measure of compensation. A claimed loss of business will not be considered as a special element of compensation unless the condemnee has proved that the condemned property has some unique or peculiar relationship to the condemnee and his business. *Dixie Hwy. Bottle Shop, Inc. v. Department of Transp.*, 150 Ga. App. 839, 258 S.E.2d 646 (1979).

Recovery of business losses. — Business losses are recoverable as a separate item only if the property is "unique." *Department of Transp. v. Dixie Hwy. Bottle Shop, Inc.*, 245 Ga. 314, 265 S.E.2d 10 (1980).

When a business belongs to the landowner, total destruction of the busi-

ness at the location must be proven before business losses may be recovered as a separate element of compensation. *Department of Transp. v. Dixie Hwy. Bottle Shop, Inc.*, 245 Ga. 314, 265 S.E.2d 10 (1980).

When the business belongs to a separate lessee, the lessee may recover for business losses as an element of compensation separate from the value of the land whether the destruction of his business is total or merely partial, provided only that the loss is not remote or speculative. *Department of Transp. v. Dixie Hwy. Bottle Shop, Inc.*, 245 Ga. 314, 265 S.E.2d 10 (1980).

Instruction on unique value erroneous unless evidence supports finding of such value. — An instruction to the jury in a condemnation case which inferentially authorizes them to award damages to the condemnee for the land taken based on the peculiar value of the land to the condemnee alone, as distinguished from its market value, generally is error where there is no evidence to authorize a finding that the land taken had any such peculiar value to the condemnee apart from its market value. *State Hwy. Dep't v. Martin*, 111 Ga. App. 428, 142 S.E.2d 84 (1965).

4. Comparable Sales and Offers of Purchase

Evidence of sale of similar property admissible. — Evidence of a sale of similar property, located near that condemned, at or near the time the condemnation proceeding was instituted, is admissible. *Housing Auth. v. Spink*, 91 Ga. App. 72, 85 S.E.2d 80 (1954).

On a question of the value of land sought to be condemned, it is competent to introduce evidence of sales of property similar to that in question, made at or near the time of the taking. The exact limit either of similarity or difference, or of nearness or remoteness in point of time is difficult, if not impossible, to prescribe by any arbitrary rule, but must to a large extent depend on the location and the character of the property and the circumstances of the case. *Fulton County v. Cox*, 99 Ga. App. 743, 109 S.E.2d 849 (1959).

Judicial determination of similarity required. — The introduction of evidence of particular sales is permitted after such evidence has been qualified by evidence of

the similarity of the comparable property with the property being condemned or taken. After the introduction of such preliminary evidence of similarity, the trial judge must determine whether the comparable property is sufficiently similar or nearly like the property being condemned, and whether the time and manner of the particular sale are truly illustrative of the value of the property being condemned. *Fulton County v. Cox*, 99 Ga. App. 743, 109 S.E.2d 840 (1959).

Comparability of sales upon which expert value witness bases his opinion goes to weight of testimony, not its admissibility. *Merritt v. Department of Transp.*, 147 Ga. App. 316, 248 S.E.2d 689 (1978).

Although unaccepted offers to purchase do not constitute evidence of market value, they are admissible where offered as partial basis for opinion testimony as to value. *Merritt v. Department of Transp.*, 147 Ga. App. 316, 248 S.E.2d 689 (1978).

Oral and not binding offers cast no light upon value. — Oral and not binding offers are so easily made and refused in a mere passing conversation, and under circumstances involving no responsibility on either side, as to cast no light upon the question of value. *Southern Ry. v. Miller*, 94 Ga. App. 701, 96 S.E.2d 297 (1956).

Where an offer to purchase excludes on its face the property to be taken and thus constitutes merely an offer to purchase the remainder, and another offer, while it includes the property to be taken, appears to be nothing more than a mere oral expression of willingness to purchase, unaccompanied by any proposed terms, any indication of ability to perform, or anything else which might indicate that it was a serious and bona fide offer, such "offers" are too susceptible of fabrication to be allowed into evidence even as a partial basis of opinion testimony. *Merritt v. Department of Transp.*, 147 Ga. App. 316, 248 S.E.2d 689 (1978).

Prospective and Consequential Damages

Measure of damages for injury to adjoining property is the diminution in the market value of the property. *Terrell County v. York*, 127 Ga. 166, 56 S.E. 309 (1906).

The measure of the consequential damages to adjoining property as a result of the condemnation of land for public purposes is the diminution of the value of the adjoining property measured by the difference between the fair market value of the property immediately before the condemnation and immediately after the condemnation. *State Hwy. Bd. v. Coleman*, 78 Ga. App. 54, 50 S.E.2d 262 (1948).

The question of consequential damages involves the consideration of the value of the remaining land before the taking and its value after the taking and a determination of whether or not there was a difference in the value before and after the taking. *Sumner v. State Hwy. Dep't*, 110 Ga. App. 646, 139 S.E.2d 493 (1964); *Simon v. Department of Transp.*, 245 Ga. 478, 265 S.E.2d 777 (1980).

Consequential benefits to remaining land may be considered to offset consequential damages. *Fulton County v. Power*, 109 Ga. App. 783, 147 S.E.2d 474 (1964).

Consequential benefits to remaining lands may be shown only as an offset against consequential damages and may not be used as an offset against the value of the land actually taken. *Merritt v. Department of Transp.*, 147 Ga. App. 316, 248 S.E.2d 689 (1978).

Relevant factors in determining consequential damage to remaining property. — That condemned land produces items which may be sold in the market may be shown as affecting its market value. The presence or absence of water on the land may be shown in like manner. The extent of the land's productive capacity and the amount and nature of available water is relevant. If these are removed or lessened by the improvements made, that is relevant in showing consequential damage to the property remaining. *State Hwy. Dep't v. Harrison*, 115 Ga. App. 349, 154 S.E.2d 723, overruled on other grounds, *Willis v. Hill*, 116 Ga. App. 848, 159 S.E.2d 145 (1967), rev'd, 224 Ga. 263, 161 S.E.2d 281 (1968).

Evidence of noise and other elements allowed in determining consequential damages. — If shown to affect adversely the value and use of the condemnee's remaining property, evidence of noise and other elements may be taken into con-

sideration by the jury in determining consequential damages. *State Hwy. Dep't v. Augusta Dist. of N. Ga. Conference of Methodist Church*, 115 Ga. App. 162, 154 S.E.2d 29 (1967).

It is error to admit evidence of diminution in value of adjoining property without evidence of fair market value before the condemnation, for such evidence is a mere conclusion of the witness without foundations of fact for the consideration of the jury. *State Hwy. Bd. v. Coleman*, 78 Ga. App. 54, 50 S.E.2d 262 (1948).

Damage to one contiguous parcel determinable without reference to others. — Where adjoining or contiguous parcels of land belonging to the same owner are put to separate and distinct uses, and do not together constitute one entire tract, damages to one of the parcels, as a result of the performance of public work in the neighborhood, is determinable without reference to the effect of the work upon the adjoining land. *Gaines v. City of Calhoun*, 42 Ga. App. 89, 155 S.E. 214 (1930).

Damage to portion of tract balanced against benefit to whole. — Where a tract of land having a value and a peculiar utility as an entirety is affected by public work, the owner of the land, for the purpose of recovering damages resulting from the performance of the work, cannot sever from the entire tract a portion of it which has been peculiarly damaged and recover damages without reference to the benefits accruing to the entire tract by virtue of the performance of the work. *Gaines v. City of Calhoun*, 42 Ga. App. 89, 155 S.E. 214 (1930).

Damages and judgment bar recovery of consequential damages except those resulting from negligent construction. — Since this section and § 22-2-63 plainly provide that the appraisers in proceedings to condemn private property for public purposes shall assess actual damages for the property taken and consequential damages to the property not taken, an award of damages and judgment of condemnation bar recovery of consequential damages except such as result from negligent and improper construction. *Whipple v. County of Houston*, 214 Ga. 532, 105 S.E.2d 898 (1958).

Proper construction not grounds for damages to remainder of property. — Construction that is done with due care and is proper is not grounds for recovery for damages to the remainder of the property of the condemnee. *Whipple v. County of Houston*, 214 Ga. 532, 105 S.E.2d 898 (1958).

Mistaken theory that construction would improve, not damage, remaining property. — Where, due to a mistake of fact unmixed with negligence, the condemnation proceeding for a public road was conducted throughout upon the theory that the road would be paved at approximately grade level, thus improving rather than damaging the remaining abutting property, and there was nothing to indicate that a fill of from 25 to 40 feet would be made in front of the remaining property which would damage it in the amount of approximately \$20,000.00, a petition in equity, alleging these facts and alleging that the mistake prevented the owners from proving this consequential damage, alleged a cause of action to set aside the award and the judgment of condemnation and to recover the full damages. *Whipple v. County of Houston*, 214 Ga. 532, 105 S.E.2d 898 (1958).

Valuation of adjacent land taken for bridge and roads. — It is proper, in order to arrive at just and adequate compensation in determining the value of adjacent land taken for the bridge and roads, that its prospective value as a bridge site and its present value as a ferry site may be taken into the calculation. *Mitchell County v. Hudspeth*, 151 Ga. 767, 108 S.E. 305 (1921).

Where land is taken for a public highway and bridge over a stream, the owners are not entitled to have the diminution or destruction of the profits of their ferry, due to the erection of the bridge, considered in determining the value of the property taken by the state for its highway and the bridge, when the franchise of the owners to operate the ferry is not exclusive. *State Hwy. Board v. Willcox*, 168 Ga. 883, 149 S.E. 182 (1929).

Condemnor's testimony, standing alone, held inadmissible on question of consequential damages. — Where a limited access highway is condemned by the

State, which highway cuts off several acres from the remainder of the land of the condemnee leaving those several acres without any access thereto, testimony offered by the condemnor that with access there would be no damage to the isolated land, standing alone, is inadmissible and without probative value on the question of

consequential damages to those several acres without access. *State Hwy. Dep't v. Howard*, 124 Ga. App. 76, 183 S.E.2d 26 (1971).

Evidence insufficient to require charge on consequential benefits. — See *Garden Parks v. Fulton County*, 88 Ga. App. 97, 76 S.E.2d 31 (1953).

OPINIONS OF THE ATTORNEY GENERAL

Measure of damages for property taken is pecuniary loss to owner. — The measure of damages for property taken by the right of eminent domain, being compensatory in its nature, is the pecuniary loss sustained by the owner, taking into consideration all relevant factors; ordinarily this loss is represented by the fair market value of the property interest taken, but it may be fair and reasonable value of the property taken if in fact the market value would not coincide with the actual value thereof. 1958-59 Op. Att'y Gen. p. 271.

And is ordinarily measured by market value. — Ordinarily, when an entire parcel of property is taken, or an entire leasehold interest is taken, the measure of the damages is the "market value" of the land or leasehold interest as the case might be; market value has been defined as the price which may be paid by one wishing but not required to buy, to one wishing but not required to sell. 1958-59 Op. Att'y Gen. p. 271.

Assessment of consequential damages. — In assessing consequential damages, the difference would lie in the valuation of the land which remains after condemnation, as compared with the value of that fragment of land before the condemnation was commenced; in considering this "damage," the assessors or jury would be bound to deduct from the whole damage, any increase which might result from the improvement respecting the sales value or market value of the tract not taken. 1958-59 Op. Att'y Gen. p. 273.

Payment of taxes on land taken by eminent domain. — The payment of city or county taxes is not a proper element of damages in a condemnation case; the

payment of property taxes is a responsibility of the landowner only so long as he, in fact, owns the property. The property owner or condemnee would be responsible for payment of taxes up to the date of taking; after that time, the responsibility for the payment of these taxes would lie upon the condemning body, if in fact that body is an entity which would have the responsibility for payment of these taxes. 1969 Op. Att'y Gen. No. 69-494.

Cost of moving personal property not an element of damage. — The cost of moving personal property from real estate which is taken for public purposes cannot be considered as an element of damage, as such; however, the cost of removal of either fixtures, buildings, or personalty, especially when used for business purposes, may be considered as one of the factors entering into a determination of the value of the real estate to the condemnee from whom it is taken. 1958-59 Op. Att'y Gen. p. 271.

But may be illustrative of damage done by taking. — The cost of moving personal property may in many instances, be evidential as to, or illustrative of, the damage done to such personal property by the taking; such damage must be paid by the authority which so takes it for public purposes. 1958-59 Op. Att'y Gen. p. 276.

Where area taken for right of way intersects building on tract involved, i.e., a portion of the building lies on land which is taken, and a portion of the building lies on land which is not taken, that portion of the building which extends upon the right of way may be severed if it is practicable to do so without destruction of the building; if severance would result in destruction, then the measure of damage to the building is its full value. 1958-59 Op. Att'y Gen. p. 273.

In circumstances where a condemnation causes the intersection of a building by the line drawn between the land taken and the land not taken, where it is impossible to sever the building and the whole building would be destroyed, the value of the land without the building taken would be charged against the condemnor; the true market value of the remaining portion of the condemnee's land without the building, of course, it being destroyed, would be compared with the value of that tract before taking. 1958-59 Op. Att'y Gen. p. 273.

Expense of removing facilities from railroad right-of-way. — There is no reason why the State Highway Department (now Department of Transportation) may

not bear the expense (or that part which is not borne by the railroad or the United States government) of the temporary and permanent removal of facilities located on a railroad right of way. 1957 Op. Att'y Gen. p. 132.

No distinction can be drawn, as to the obligation to pay the cost of removal of facilities on a right of way, between temporary relocations and permanent relocations. 1957 Op. Att'y Gen. p. 132.

Powder company which is forced to move the location of its place of business because a highway is constructed too near the place of business is entitled to compensation for certain moving expenses. 1957 Op. Att'y Gen. p. 137.

RESEARCH REFERENCES

Am. Jur. 2d. — 26 Am. Jur. 2d, Eminent Domain, § 151. 27 Am. Jur. 2d, Eminent Domain, §§ 266-296, 310-320, 357-374, 419-442.

C.J.S. — 25A C.J.S., Damages, §§ 2, 4. 29A C.J.S., Eminent Domain, §§ 110-185, 271-275. 30 C.J.S., Eminent Domain, §§ 276-278.

ALR. — Profits derived from business conducted on property taken by eminent domain as evidence of market value, 7 ALR 163.

Right under constitutional provision against taking or damaging, to recover in other than an eminent domain proceeding, for consequential damages to property no part of which is taken, 20 ALR 516.

Limitation applicable to action for consequential damage as result of taking or damaging of property for public use, 30 ALR 1190.

Right to interest in condemnation proceedings during owner's retention of possession, 32 ALR 98.

Measure of damages or compensation where property is taken to widen street, 64 ALR 1513.

Income as an element in determining value of property taken in eminent domain, 65 ALR 455.

Measure and items of compensation or damages for flooding property under the right of eminent domain, 106 ALR 955.

Right of property owner to compensation for diversion of traffic by relocation or rerouting of highway, 118 ALR 921.

Elements and measure of compensation for power lines or other wire lines over private property, 124 ALR 407.

Special value or adaptability of property for purpose for which it is taken, as an element of, or matter for consideration in fixing, damages in condemnation proceedings, 124 ALR 910.

Distinction between income or profits from business on land and income or profits from use of land, as affecting admissibility of evidence in that regard on question of damages in eminent domain, 134 ALR 1125.

Deduction of benefits in determining compensation or damages in eminent domain, 145 ALR 7.

Increment to value, from project for which land is condemned, as a factor in fixing compensation, 147 ALR 66.

Frustration of contractual rights as basis of claim for compensation where another's real property is taken in exercise of eminent domain, 152 ALR 307.

Price at which one whose land is taken or damaged under power of eminent domain has sold, contracted to sell, or optioned land in question to third person as evidence of its market value in condemnation proceeding or related action for damages, 155 ALR 262.

What physical construction amounts to a change of grade within statute relating to award of damages, 156 ALR 416.

Determination in eminent domain proceedings of market value of land as affected by mineral deposits or similar conditions, 156 ALR 1416.

Are different estates or interests in real property taken under eminent domain to be valued separately, or entire property to be valued as a unit and the amount apportioned among separate interests, 166 ALR 1211.

Eminent domain: cost of repairs and improvements on property taken, as evidence of its value, 172 ALR 236.

Eminent domain: valuation of land and improvements and fixtures thereon separately or as unit, 1 ALR2d 878.

Elements and measure of lessee's compensation for taking or damaging leasehold in eminent domain, 3 ALR2d 286.

Compensation for, or extent of rights acquired by, taking of land, as affected by condemner's promissory statements as to character of use or undertakings to be performed by it, 7 ALR2d 364.

Admissibility in condemnation proceedings of opinion evidence as to probable profits derivable from land condemned if devoted to particular agricultural purposes, 16 ALR2d 1113.

Abutting owner's right to damages or other relief for loss of access because of limited-access highway or street, 43 ALR2d 1072.

Right to intervene in court review of zoning proceeding, 46 ALR2d 1059.

Right of adjoining landowners to intervene in condemnation proceedings on ground that they might suffer consequential damage, 61 ALR2d 1292.

Cost to property owner of moving personal property as element of damages or compensation in eminent domain proceedings, 69 ALR2d 1453.

Measure of damages or compensation in eminent domain as affected by premises being restricted to particular educational, religious, charitable, or noncommercial use, 75 ALR2d 1382.

Counsel's use, in trial of condemnation proceeding, of chart, diagram or blackboard, not introduced in evidence,

relating to damages or the value of the property condemned, 80 ALR2d 1270.

Admissibility on issue of value of real property of evidence of sale price of other real property, 85 ALR2d 110.

Bad reputation of condemned property derived from its illegal use for gambling, prostitution, or the like, as factor decreasing compensation or damages, 87 ALR2d 1156.

Changes in purchasing power of money as affecting compensation in eminent domain proceedings, 92 ALR2d 772.

Depreciation in value, from project for which land is condemned, as a factor in fixing compensation, 5 ALR3d 901.

Eminent domain: deduction of benefits in determining compensation or damages in proceedings involving opening, widening, or otherwise altering highway, 13 ALR3d 1149.

Propriety and effect, in eminent domain proceeding, of argument or evidence as to landowner's unwillingness to sell property, 17 ALR3d 1449.

Propriety and effect of argument or evidence as to financial status of parties in eminent domain proceeding, 21 ALR3d 936.

Existence of restrictive covenant as element in fixing value of property condemned, 22 ALR3d 961.

Eminent domain: admissibility, on issue of value of condemned real property, of rental value of other real property, 23 ALR3d 724.

Admissibility of evidence of proposed or possible subdivision or platting of condemned land on issue of value in eminent domain proceedings, 26 ALR3d 780.

Measure of damages for condemnation of cemetery lands, 42 ALR3d 1314.

Traffic noise and vibration from highway as element of damages in eminent domain, 51 ALR3d 860.

Good will or "going concern" value as element of lessee's compensation for taking leasehold in eminent domain, 58 ALR3d 566.

Loss of liquor license as compensable in condemnation proceeding, 58 ALR3d 581.

Compensation for diminution in value of the remainder of property resulting from taking or use of adjoining land of others for the same undertaking, 59 ALR3d 488.

Eminent domain: consideration of fact that landowner's remaining land will be subject to special assessment in fixing severance damages, 59 ALR3d 534.

Right in eminent domain proceeding to call as witness expert engaged but not called as witness by opposing party, 71 ALR3d 1119.

Eminent domain: determination of just compensation for condemnation of billboards or other advertising signs, 73 ALR3d 1122.

Eminent domain: right of owner of land not originally taken or purchased as part of adjacent project to recover, on enlargement of project to include adjacent land, enhanced value of property by reason of proximity to original land — state cases, 95 ALR3d 752.

Eminent domain: recovery of value of improvements made with knowledge of impending condemnation, 98 ALR3d 504.

22-2-63. Manner of assessment.

The assessors, or a majority of them, shall assess the value of the property or interest taken or used, or the damage done, shall assess the consequential damages to the property or interests not taken, and shall deduct from such consequential damages the consequential benefits to be derived by the owner from the operation of the franchise by the condemnor or from the carrying on of the business of the condemnor, provided that the consequential benefits assessed shall in no case exceed the consequential damages assessed; provided, further, that nothing in this Code section shall be so construed as to deprive the owner of the actual value of his property or interest so taken or used. (Ga. L. 1894, p. 95, § 19; Civil Code 1895, § 4675; Civil Code 1910, § 5225; Code 1933, § 36-504.)

Law reviews. — For comment on State Hwy. Dep't v. Lumpkin, 222 Ga. 727, 152

S.E.2d 557 (1966), see 3 Ga. St. B.J. 483 (1967).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
VALUE OF PROPERTY TAKEN
PROSPECTIVE AND CONSEQUENTIAL DAMAGES

General Consideration

Condemnor liable for both direct and consequential damages. — In condemnation proceedings the condemnor is liable not only for direct damages for the actual land taken for the public use, but in addition thereto for all consequential damages which naturally and proximately flow from the taking of the land to the remainder of the parcel or tract of land not taken as tend to diminish its market value. Georgia

Power Co. v. McCrea, 46 Ga. App. 279, 167 S.E. 542 (1933).

There are two elements to be considered in connection with the damages in condemnation cases, the actual value of the land taken and the consequential damage or consequential benefit to the remaining land. Fulton County v. Power, 109 Ga. App. 783, 137 S.E.2d 474 (1964).

Law allows damages to property not actually appropriated in an eminent

domain proceeding as consequential damages if such damages are shown. *Justice v. State Hwy. Dept.*, 100 Ga. App. 794, 112 S.E.2d 307 (1959).

And consequential damages must be recovered in condemnation proceeding. — Consequential damages to property not taken in a condemnation proceeding resulting from the proper construction and maintenance of the object for which the property is taken must be recovered, if recovered at all, in the condemnation proceeding. *State Hwy. Dep't v. Kaylor*, 110 Ga. App. 46, 137 S.E.2d 664 (1964).

Direct and consequential damages to be figured separately. — In any eminent domain case the evidence and instructions to the jury should be such that they are enabled to figure separately the value of the land or interest therein which is taken and the consequential damages to the land not taken, the latter of course balanced against any consequential benefits and by adding the two figures return a lump sum verdict which includes both items of depreciated value to the landowner. *Georgia Power Co. v. Sinclair*, 122 Ga. App. 305, 176 S.E.2d 639 (1970).

Remote and speculative or possible damages are not allowed. *McCrea v. Georgia Power Co.*, 46 Ga. App. 276, 167 S.E. 540 (1933).

Remote or merely speculative or possible damages are not allowed in considering the value of the land taken nor consequential damage to the land not taken. *Southern Ry. v. Miller*, 94 Ga. App. 701, 96 S.E.2d 297 (1956).

Value of land taken and consequential damages are matters of opinion. — The question of the value of the land taken and condemned and the amount of consequential damages to be assessed against the condemnor for the remaining land are matters of opinion. *Derrick v. Rabun County*, 107 Ga. App. 229, 129 S.E.2d 583 (1963).

Measure of damages for property taken is pecuniary loss sustained by owner, taking into consideration all relevant factors. Ordinarily this loss is represented by the fair market value of the property interest taken, but it may be the fair and reasonable value of the property taken if in fact the market value would not coincide

with the actual value thereof. *Housing Auth. v. Savannah Iron & Wire Works, Inc.*, 91 Ga. App. 881, 87 S.E.2d 671 (1955).

Assessment of compensation covers all damages which result from proper construction, whether those damages are foreseen or not. *Whipple v. County of Houston*, 214 Ga. 532, 105 S.E.2d 898 (1958).

Only direct damages allowed where legal improvements properly erected and maintained. — Where the public authorities properly erected and properly maintain the improvements authorized by law, the only right of action which is maintainable is that conferred by state constitutional provision; it does not sound in tort, and the recovery permitted is strictly limited to the direct damage inflicted by diminishing the market value of the property damaged, as measured by the difference in its market value before and immediately after the construction of the public works, excluding all consequential damages subsequently accruing, such as might be recoverable in an action sounding in tort, based on the maintenance of a continuing, abatable nuisance. *Felton v. State Hwy. Bd.*, 51 Ga. App. 930, 181 S.E. 506 (1935).

It cannot be assumed in condemnation proceedings that there will be negligent construction or operation of the project so as to cause damage in excess of that which would naturally and proximately result from the construction and operation thereof. *McCrea v. Georgia Power Co.*, 46 Ga. App. 276, 167 S.E. 540 (1933).

Contiguity of parcels does not render the aggregate a tract. — The mere contiguity of several parcels of land belonging to one owner does not in itself render the lots in the aggregate an entire tract. *Gaines v. City of Calhoun*, 42 Ga. App. 89, 155 S.E. 214 (1930).

Plating and subdivision does not necessarily destroy unity of tract. — The mere platting of a tract of land and its subdivision into vacant building lots does not necessarily destroy the oneness or unity of the entire property. *Gaines v. City of Calhoun*, 42 Ga. App. 89, 115 S.E. 214 (1930).

Assessment by majority of assessors sufficient. — It is not necessary to the validity of an assessment in a condemnation proceeding that all three of the assessors agree upon a valuation. A majority is sufficient. *Cable v. State Hwy. Bd.*, 208 Ga. 593, 68 S.E.2d 564 (1952).

Assessment made by two assessors in absence of third cannot be collaterally attacked in a suit for injunction. If the assessment is irregular or erroneous, it must be vacated and set aside in a direct attack upon the award. *Cable v. State Hwy. Bd.*, 208 Ga. 593, 68 S.E.2d 564 (1952).

Rule for determining damages when only small portion of land is taken is, first, that the measure of damages for the part of the lot actually taken is the difference between the "market value" of the whole lot just before the taking and the "market value" of the whole lot immediately after taking; and second, that the measure of consequential damages, if any, for the part of the lot not taken, where there are either or both benefits and damages involved, is the difference between the greatest "market value" of the land not taken before the portion is taken off and improvements (benefits) made, less the "market value" of the remainder of the land after the portion of land is taken off and improvements made. *State Hwy. Bd. v. Bridges*, 60 Ga. App. 240, 3 S.E.2d 907 (1939).

In a proceeding to condemn only a portion of a tract of land the only question to be determined by the jury is the amount which the condemnor should pay as just and adequate compensation for the part taken and consequential damages, if any, to the remaining portion of the tract, as such damages may be offset, but not exceeded, by consequential benefits. *Alabama Power Co. v. Chandler*, 217 Ga. 550, 123 S.E.2d 767 (1962).

Damages allowed for loss of right of access. — Where a street upon which a lot abuts is closed by an obstruction at an intersecting street, which, as respects the lot, makes the street upon which it abuts a cul-de-sac, although the obstruction is neither immediately in front of the lot nor touches the lot, and the obstruction thereby materially diminishes and curtails the right of the owner to the free and uninterrupted use of the street in front of the lot, as a

means of access to and from different parts of the city, it constitutes a special damage to the lot, different in kind from that inflicted upon the community in general, and the owner has a right of action in damages therefor. *Felton v. State Hwy. Bd.*, 51 Ga. App. 930, 181 S.E. 506 (1935).

Where a highway or roadway to which the condemnee has a right of access is condemned as part of a limited access highway the condemnor must necessarily pay for the taking of the right of access. *State Hwy. Dep't v. Ford*, 112 Ga. App. 270, 144 S.E.2d 924 (1965).

But not for easement to and from limited access highway. — Where land is condemned for use as a new limited access highway the condemnee is not entitled to damages, actual or consequential, for lack of access to said new highway by reason of any rights of easement for ingress and egress to and from said highway. *State Hwy. Dep't v. Ford*, 112 Ga. App. 270, 144 S.E.2d 924 (1965).

Damages for inconvenient access not compensable. — Damages for mere inconvenience and circuity of travel in the access to one's property are not compensable in an eminent domain proceeding. *State Hwy. Dep't v. Cantrell*, 119 Ga. 241, 166 S.E.2d 604 (1969).

Compensable elements of damage do not include prepayment interest penalties. *DeKalb County v. United Family Life Ins. Co.*, 235 Ga. 417, 219 S.E.2d 707 (1975).

Examination of condemnee where perpetual easement for aviation purposes sought. — Where the condemnor seeks a perpetual easement for aviation purposes, in, to, upon and over, all of condemnee's property, the examination of the condemnee is not limited to planes using only one particular runway. *Schoolcraft v. DeKalb County*, 126 Ga. App. 101, 189 S.E.2d 915 (1972).

Charge substantially in the language of this section and § 22-2-62 is not error. *State Hwy. Bd. v. Coleman*, 78 Ga. App. 54, 50 S.E.2d 262 (1948).

Cited in *Nalley Land & Inv. Co. v. State Hwy. Bd.*, 49 Ga. App. 258, 175 S.E. 269 (1934); *Florida Blue Ridge Corp. v. Tennessee Elec. Power Co.*, 106 F.2d 913 (5th Cir. 1939); *State Hwy. Dep't v. Peavy*, 77 Ga. App. 308, 48 S.E.2d 478 (1948);

Housing Auth. v. McDonald, 87 Ga. App. 392, 74 S.E.2d 113 (1953); Georgia Power Co. v. Pittman, 92 Ga. App. 673, 89 S.E.2d 577 (1955); O.K., Inc. v. State Hwy. Dep't, 213 Ga. 666, 100 S.E.2d 906 (1957); Kellett v. Fulton County, 215 Ga. 551, 111 S.E.2d 364 (1959); State Hwy. Dep't v. Robinson, 103 Ga. App. 12, 118 S.E.2d 289 (1961); Fulton County v. Bailey, 107 Ga. App. 512, 130 S.E.2d 800 (1963); State Hwy. Dep't v. Stevens, 128 Ga. App. 418, 196 S.E.2d 890 (1973); Department of Transp. v. Knight, 143 Ga. App. 748, 240 S.E.2d 90 (1977); Georgia Power Co. v. 54.20 Acres of Land, 563 F.2d 1178 (5th Cir. 1977); Georgia Power Co. v. Sanders, 617 F.2d 1112 (5th Cir. 1980).

Value of Property Taken

Owner entitled to fair market value for property taken. — An owner of property taken for public purposes is entitled to receive as compensation therefor the fair market value. State Hwy. Bd. v. Warthen, 54 Ga. App. 759, 189 S.E. 76 (1936).

"Value," as used in reference to land taken under eminent domain, is a relative term depending on the circumstances. Thus, under some circumstances, "the value" might be the actual value, the market value, the salable value, the reasonable value, and the cash value. State Hwy. Bd. v. Bridges, 60 Ga. App. 240, 3 S.E.2d 907 (1939).

It was not reversible error to charge the jury that "value," which is qualified in this section as "actual value," is the fair and reasonable value of a strip of land actually taken. Nor was it reversible error, after so charging, not to qualify and limit the word "value" by use of the words "market value." State Hwy. Bd. v. Bridges, 60 Ga. App. 240, 3 S.E.2d 907 (1939).

Factors to be considered in estimating property value. — All the facts as to the condition of the property and its surroundings, its improvements and capabilities, may be shown and considered in estimating its value. State Hwy. Bd. v. Warthen, 54 Ga. App. 759, 189 S.E. 76 (1936).

Reproduction cost may always be used as a factor involved in the valuation of property, together with other factors such as depreciation and the nature of the prop-

erty interest seized, in determining market value. Housing Auth. v. Savannah Iron & Wire Works, Inc., 91 Ga. App. 881, 87 S.E.2d 671 (1955).

In determining value of land actually taken, consequential damages or benefits should not be considered, these being separate elements which should be considered separately. State Hwy. Bd. v. Warthen, 54 Ga. App. 759, 189 S.E. 76 (1936).

Prospective value of land for any purpose may be considered. — In arriving at the value of the land taken under condemnation proceedings, the value of the land, including its prospective value for any purpose, may be considered. Georgia Power Co. v. Carson, 46 Ga. App. 612, 167 S.E. 902 (1933).

Prospective value for any purpose may be considered in determining the value of land taken under condemnation proceedings. State Hwy. Bd. v. Coleman, 78 Ga. App. 54, 50 S.E.2d 262 (1948).

All elements and uses of the land may be taken into consideration to determine the market value of the land taken and the consequential damages to the land not taken. However, under this sort of procedure, a witness may not be permitted to testify separately as to the value of each element. Southern Ry. v. Miller, 94 Ga. App. 701, 96 S.E.2d 297 (1956).

Evidence of voluntary sales of similar lands admissible. — In a proceeding to condemn land, it is competent for the purpose of showing the value of the land being taken to introduce evidence of voluntary sales of other similar lands in the same vicinity made at or near the time of the taking and the price paid therefor. Alabama Power Co. v. Chandler, 217 Ga. 550, 123 S.E.2d 767 (1962).

Oral and not binding offers cast no light upon value. — Oral and not binding offers are so easily made and refused in a mere passing conversation, and under circumstances involving no responsibility on either side, as to cast no light upon the question of value. Southern Ry. v. Miller, 94 Ga. App. 701, 96 S.E.2d 297 (1956).

Ascertaining value of land taken by subtracting value of land remaining from value of whole land before taking is error, since this permits the consideration of con-

sequential damages or benefits in arriving at the value of the land remaining and may thus work harm to either the condemnor or the condemnee. *Fulton County v. Power*, 109 Ga. App. 783, 137 S.E.2d 474 (1964).

In eminent domain proceedings, evidence of the difference between the value of the whole property, that taken and that not taken, before the taking and after the taking is without probative value as to the actual value of the land taken and the consequential damage to that not taken. *Department of Transp. v. Brand*, 149 Ga. App. 547, 254 S.E.2d 873 (1979).

Recovery beyond fair market value for property of unique value. — Although market value is ordinarily the measure of damages, if property has a unique or special use to the owner, just and adequate compensation should be determined without restriction to market value as such. *DeKalb County v. Cowan*, 151 Ga. App. 753, 261 S.E.2d 478 (1979).

Admission of evidence of income producing qualities from land. — Where evidence as to the income producing qualities and capabilities of the land condemned is objected to, and the trial court instructs the jury that they are to consider this evidence only in arriving at a market value of the property taken and consequential damages to the remainder, there is no error in the admission of such evidence. *State Hwy. Dep't v. Harrison*, 115 Ga. App. 349, 154 S.E.2d 723, overruled on other grounds, *Willis v. Hill*, 116 Ga. App. 848, 159 S.E.2d 145 (1967), rev'd, 224 Ga. 263, 161 S.E.2d 281 (1968).

Prospective and Consequential Damages

Measure of consequential damages to adjoining property as a result of the condemnation of land for public purposes is the diminution of the value of the adjoining property measured by the difference between the fair market value of the property immediately before the condemnation and immediately after the condemnation. *State Hwy. Bd. v. Coleman*, 78 Ga. App. 54, 50 S.E.2d 262 (1948).

The loss of value inherent in the land remaining after a strip of the land is taken is the difference between the greatest market value of land not taken before the strip is taken and improvements made less

the market value of the remainder after the strip is taken off and improvements made. *Swiney v. State Hwy. Dep't*, 116 Ga. App. 667, 158 S.E.2d 321 (1967).

Damages still "consequential" as long as value inheres in remaining fee. — The loss of value in land remaining after a strip is taken may approach the full value of the land, but it is still consequential damages so long as some value inheres in the fee remaining in the condemnee. *Swiney v. State Hwy. Dep't*, 116 Ga. App. 667, 158 S.E.2d 321 (1967).

Consequential benefits to remaining lands may be shown only as offset against consequential damages and may not be used as an offset against the value of the land actually taken. *Merritt v. Department of Transp.*, 147 Ga. App. 316, 248 S.E.2d 689 (1978).

Consequential benefits refer to benefits accruing to property interests remaining in plaintiff at the site after the taking or damaging of a part thereof, and have no application where the entire interest of the plaintiff has been appropriated. *Housing Auth. v. Savannah Iron & Wire Works, Inc.*, 91 Ga. App. 881, 87 S.E.2d 671 (1955).

Reversion of title to old road to owner not consequential benefit. — Where land is condemned for the purpose of changing the location of a highway, the "consequential benefits to be derived by the owner" do not include the benefit which might be derived from the reversion to the owner of the title to the old road if and when abandoned. *St. Clair v. State Hwy. Bd.*, 45 Ga. App. 488, 165 S.E. 297 (1932).

It is error to admit evidence of diminution in value of adjoining property without evidence of fair market value before the condemnation for such evidence is a mere conclusion of the witness without foundations of fact for the consideration of the jury. *State Hwy. Bd. v. Coleman*, 78 Ga. App. 54, 50 S.E.2d 262 (1948).

Damage to one contiguous parcel determinable without reference to others.

— Where adjoining or contiguous parcels of land belonging to the same owner are put to separate and distinct uses, and do not together constitute one entire tract, damages to one of the parcels, as a result of the performance of public work in the

neighborhood, is determinable without reference to the effect of the work upon the adjoining land. *Gaines v. City of Calhoun*, 42 Ga. App. 89, 155 S.E. 214 (1930).

Damage to portion of tract balanced against benefit to whole. — Where a tract of land having a value and a peculiar utility as an entirety is affected by public work, the owner of the land, for the purpose of recovering damages resulting from the performance of the work, cannot sever from the entire tract a portion of it which has been peculiarly damaged and recover damages without reference to the benefits accruing to the entire tract by virtue of the performance of the work. *Gaines v. City of Calhoun*, 42 Ga. App. 89, 155 S.E. 214 (1930).

Destruction of unity of property as basis for consequential damages. — In condemnation action involving farm, where there is evidence to show that the land taken will, by intrusion on the general layout of the property, tend to destroy the unity of the farm and thus depreciate the market value of the part not taken, this is a legitimate subject for consideration in determining the amount of consequential damages. *Department of Transp. v. Brown*, 155 Ga. App. 622, 271 S.E.2d 876 (1980).

Opinion of witness as to diminution in value of land. — After a witness has given his opinion of the value of land which it is claimed would be subject to consequential damages by reason of condemning another part of the tract, and has stated that the structure created by the condemnor caused injury to the balance of the land, there is no error in permitting him to give his opinion as to the diminution in the value of the land. *State Hwy. Bd. v. Coleman*, 78 Ga. App. 54, 50 S.E.2d 262 (1948).

Testimony and photographs properly admitted in determining consequential damages or benefits. — Testimony as to the replanting of trees and moving house back to the same relative location from the street as existed before the condemnation, and also certain photographs of the property in question, were properly admitted as evidence for consideration by the jury in determining consequential damages or benefits. *State Hwy. Bd. v. Warthen*, 54 Ga.

App. 759, 189 S.E. 76 (1936).

Damages and judgment bar recovery of consequential damages except those resulting from negligent construction. — Since this and § 22-2-62 plainly provide that the appraisers in proceedings to condemn private property for public purposes shall assess actual damages for the property taken and consequential damages to the property not taken, an award of damages and judgment of condemnation bar recovery of consequential damages except such as result from negligent and improper construction. *Whipple v. County of Houston*, 214 Ga. 532, 105 S.E.2d 898 (1958).

Proper construction not grounds for damages to remainder of property. — Construction that is done with due care and is proper is not grounds for recovery for damages to the remainder of the property of the condemnee. *Whipple v. County of Houston*, 214 Ga. 532, 105 S.E.2d 898 (1958).

Consequential damages for improper construction subject of separate damage suit. — Consequential damages to the remainder of the property caused by the negligent or improper construction of the improvement are not proper for consideration in a condemnation proceeding, but are the subject of a separate suit for damages. *State Hwy. Dep't v. Kaylor*, 110 Ga. App. 46, 137 S.E.2d 664 (1964).

Mistaken theory that construction would improve, not damage, remaining property. — Where, due to a mistake of fact unmixed with negligence, the condemnation proceeding for a public road was conducted throughout upon the theory that the road would be paved at approximately grade level, thus improving rather than damaging the remaining abutting property, and there was nothing to indicate that a fill of from 25 to 40 feet would be made in front of the remaining property which would damage it in the amount of approximately \$20,000.00, a petition in equity, alleging these facts and alleging that the mistake prevented the owners from proving this consequential damage, alleged a cause of action to set aside the award and the judgment of condemnation and to recover the full damages. *Whipple v. County of Houston*, 214 Ga. 532, 105 S.E.2d 898 (1958).

Jury charge, based on this section, regarding consequential damages. — The court did not err in charging the jury where in part of the charge the correct rules as contained in this section were given

as to the assessment of consequential damages in case the consequential benefits equaled or exceeded the consequential damages. *Georgia, F. & A. Ry. v. Norman*, 140 Ga. 42, 78 S.E. 411 (1913).

OPINIONS OF THE ATTORNEY GENERAL

Assessment of consequential damages. — In assessing consequential damages, the difference would lie in the valuation of the land which remains after condemnation, as compared with the value of that fragment of land before the condemnation was commenced; in considering this "damage," the assessors or jury would be bound to deduct from the whole damage, any increase which might result from the improvement respecting the sales value or market value of the tract not taken. 1958-59 Op. Att'y Gen. p. 273.

Payment of taxes on land taken by eminent domain. — The payment of city or county taxes is not a proper element of damages in a condemnation case; the payment of property taxes is a responsibility of the landowner only so long as he, in fact, owns the property. The property owner or condemnee would be responsible for payment of taxes up to the date of taking; after that time, the responsibility for the payment of these taxes would lie upon the condemning body, if in fact that body is an entity which would have the responsibility for payment of these taxes. 1969 Op. Att'y Gen. No. 69-494.

Cost of transferring personal business articles to new location cannot be charged as such, but the reasonable cost of such moving may be evidence which is illustrative of the damage to the property, mea-

sured as of that particular owner; therefore, the cost of such moving should be ascertained and estimated, either when arriving at a value for negotiation, or when determining evidence of a value in condemnation case. 1958-59 Op. Att'y Gen. p. 276.

Where area taken for right of way intersects building on tract involved, i.e., a portion of the building lies on land which is taken, and a portion of the building lies on land which is not taken, that portion of the building which extends upon the right of way may be severed if it is practicable to do so without destruction of the building; if severance would result in destruction, then the measure of damage to the building is its full value. 1958-59 Op. Att'y Gen. p. 273.

In circumstances where a condemnation causes the intersection of a building by the line drawn between the land taken and the land not taken, where it is impossible to sever the building and the whole building would be destroyed, the value of the land without the building taken would be charged against the condemnor; the true market value of the remaining portion of the condemnee's land without the building, of course, it being destroyed, would be compared with the value of that tract before taking. 1958-59 Op. Att'y Gen. p. 273.

RESEARCH REFERENCES

Am. Jur. 2d. — 26 Am. Jur. 2d, Eminent Domain, § 152. 27 Am. Jur. 2d, Eminent Domain, §§ 266-296, 310-320, 357-374, 419-442.

C.J.S. — 25A C.J.S., Damages, § 2. 29A C.J.S., Eminent Domain, §§ 104-185, 271-275. 30 C.J.S., Eminent Domain, §§ 276-278, 296, 297.

ALR. — Profits derived from business conducted on property taken by eminent domain as evidence of market value, 7 ALR 163.

Loss of right to contest assessment in proceeding for street or sewer improvement by waiver, estoppel, or the like, 9 ALR 634.

Loss of right to contest assessment in drainage proceeding by waiver, estoppel, or the like, 9 ALR 842.

Expense of building and maintaining fences as element in the determination of damages in eminent domain, 10 ALR 451.

Right to interest in condemnation proceedings during owner's retention of possession, 32 ALR 98.

Protection of rights of mortgagee in eminent domain proceedings, 58 ALR 1534.

Right of court to reduce or increase award in condemnation and confirm it as reduced or increased, 61 ALR 194.

Failure to claim in special assessment proceedings compensation for taking or damaging property in construction of improvements as waiver or estoppel, 64 ALR 764.

Measure of damages or compensation where property is taken to widen street, 64 ALR 1513.

Compensation in eminent domain in respect of fixtures or chattels used in connection with real property taken or damaged, 90 ALR 159.

Elements and measure of compensation for power lines or other wire lines over private property, 124 ALR 407.

Special value or adaptability of property for purpose for which it is taken, as an element of, or matter for consideration in fixing, damages in condemnation proceedings, 124 ALR 910.

Distinction between income or profits from business on land and income or profits from use of land, as affecting admissibility of evidence in that regard on question of damages in eminent domain, 134 ALR 1125.

Increment to value, from project for which land is condemned, as a factor in fixing compensation, 147 ALR 66.

Frustration of contractual rights as basis of claim for compensation where another's real property is taken in exercise of eminent domain, 152 ALR 307.

Price at which one whose land is taken or damaged under power of eminent domain has sold, contracted to sell, or optioned land in question to third person as evidence of its market value in condemnation proceeding or related action for damages, 155 ALR 262.

Are different estates or interests in real property taken under eminent domain to be valued separately, or entire property to be valued as a unit and the amount apportioned among separate interests, 166 ALR 1211.

General governmental policy (distinguished from specific project) as affecting compensation allowable in eminent domain, 167 ALR 502.

Eminent domain: valuation of land and improvements and fixtures thereon separately or as unit, 1 ALR2d 878.

Elements and measure of lessee's compensation for taking or damaging leasehold in eminent domain, 3 ALR2d 286.

Compensation for, or extent of rights acquired by, taking of land, as affected by condemner's promissory statements as to character of use or undertakings to be performed by it, 7 ALR2d 364.

Attorney's fees as within statute imposing upon condemner liability for "expenses," "costs," and the like, 26 ALR2d 1295.

Quotient condemnation report or award by commissioners or the like, 39 ALR2d 1208.

Cost to property owner of moving personal property as element of damages or compensation in eminent domain proceedings, 69 ALR2d 1453.

Measure of damages or compensation in eminent domain as affected by premises being restricted to particular educational, religious, charitable, or noncommercial use, 75 ALR2d 1382.

Counsel's use, in trial of condemnation proceeding, of chart, diagram or blackboard, not introduced in evidence, relating to damages or the value of the property condemned, 80 ALR2d 1270.

Bad reputation of condemned property derived from its illegal use for gambling, prostitution, or the like, as factor decreasing compensation or damages, 87 ALR2d 1156.

Changes in purchasing power of money as affecting compensation in eminent domain proceedings, 92 ALR2d 772.

Valuation at time of original wrongful entry by condemnor or at time of subsequent initiation of condemnation proceedings, 2 ALR3d 1038.

Depreciation in value, from project for which land is condemned, as a factor in fixing compensation, 5 ALR3d 901.

Eminent domain: deduction of benefits in determining compensation or damages in proceedings involving opening, widening, or otherwise altering highway, 13 ALR3d 1149.

Propriety and effect, in eminent domain proceeding, of argument or evidence as to landowner's unwillingness to sell property, 17 ALR3d 1449.

Existence of restrictive covenant as element in fixing value of property condemned, 22 ALR3d 961.

Measure and elements of damage for limitation of access caused by conversion of conventional road into limited-access highway, 42 ALR3d 148.

Measure of damages for condemnation of cemetery lands, 42 ALR3d 1314.

Good will or "going concern" value as element of lessee's compensation for taking

leasehold in eminent domain, 58 ALR3d 566.

Loss of liquor license as compensable in condemnation proceeding, 58 ALR3d 581.

Compensation for diminution in value of the remainder of property resulting from taking or use of adjoining land of others for the same undertaking, 59 ALR3d 488.

Eminent domain: consideration of fact that landowner's remaining land will be subject to special assessment in fixing severance damages, 59 ALR3d 534.

Eminent domain: right of owner of land not originally taken or purchased as part of adjacent project to recover, on enlargement of project to include adjacent land, enhanced value of property by reason of proximity to original land — state cases, 95 ALR3d 752.

Eminent domain: recovery of value of improvements made with knowledge of impending condemnation, 98 ALR3d 504.

22-2-64. Entry of findings by assessors.

The assessors shall enter their findings on the notice substantially as follows:

Upon the application of A. B. to condemn the following property or interest of C. D.: _____, notice was duly served by the sheriff (or his deputy) on C. D. (owner, trustee, representative, or judge of the probate court, as the case may be) by (mailing, posting, etc., as the case may be). The applicant appointed E. F. as assessor. The (owner, judge of the probate court, representative, as the case may be) appointed G. H. as assessor, and they two (or judge of the superior court) appointed I. J. as assessor; E. F., G. H., and I. J., after being duly sworn and hearing the evidence, find and award that for taking the property or interest sought to be condemned, to wit: _____, the said A. B. shall pay to C. D., as owner, the sum of \$_____. The consequential damages to the property or interest of C. D. not taken amount to \$_____, and the consequential benefits to \$_____; and the said A. B. shall pay said C. D. the difference between such damage and such benefit.

(Ga. L. 1894, p. 95, § 20; Civil Code 1895, § 4676; Civil Code 1910, § 5226; Code 1933, § 36-507.)

JUDICIAL DECISIONS

Award by assessors binding until reversed or set aside. — An award by condemnation assessors and the order and judgment of the court directing the filing thereof are judgments rendered by a competent tribunal, and, even if erroneous, are binding upon a condemnee until reversed or set aside, and cannot be collaterally attacked in the condemnee's equitable petition for injunction against the condemnor's contractor. *McGreggor v. W.L. Florence Constr. Co.*, 208 Ga. 176, 65 S.E.2d 809 (1951).

Jury use of form similar to finding of assessors. — Where the procedure is

proper in submitting to the jury a form similar to the finding of assessors under this section and § 22-2-63, and there is no exception to such procedure, the jury, like the appraisers, has the right under § 22-2-63, if the evidence so authorized, to offset any consequential damages to the "property not taken" with the "consequential benefits," and to find the difference, if any, in favor of the property owner, but to award nothing for such damages if the "consequential benefits" equaled or exceeded the "consequential damages." *Nalley Land & Inv. Co. v. State Hwy. Bd.*, 49 Ga. App. 258, 175 S.E. 269 (1934).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Eminent Domain, § 443.

C.J.S. — 30 C.J.S., Eminent Domain, §§ 299-304.

22-2-65. Filing and recording of award.

Within ten days after the award is made, it shall be filed and recorded in the office of the clerk of the superior court of the county where the property or interest is situated. (Ga. L. 1894, p. 95, § 21; Civil Code 1895, § 4677; Civil Code 1910, § 5227; Code 1933, § 36-508.)

JUDICIAL DECISIONS

After award of assessors has been made condemnor cannot dismiss condemnation suit. *Housing Auth. v. Mercer*, 123 Ga. App. 38, 179 S.E.2d 275 (1970).

Award by assessors binding until reversed or set aside. — An award by condemnation assessors and the order and judgment of the court directing the filing thereof are judgments rendered by a competent tribunal, and, even if erroneous, are binding upon a condemnee until reversed or set aside, and cannot be collaterally attacked in the condemnee's equitable petition for injunction against the condemnor's contractor. *McGreggor v. W.L. Florence Constr. Co.*, 208 Ga. 176, 65 S.E.2d 809 (1951).

Filing is not essential to validity but only to enforceability of the award of the assessors. *Hodges v. South Georgia Natural Gas Co.*, 111 Ga. App. 180, 141 S.E.2d 182 (1965).

This section is directory and contains no provision that delay in recordation of the award renders the same invalid. *Landers v. Georgia Pub. Serv. Comm'n*, 217 Ga. 804, 125 S.E.2d 495 (1962).

Cited in *State Hwy. Bd. v. Long*, 61 Ga. App. 173, 6 S.E.2d 130 (1939); *Woodside v. City of Atlanta*, 214 Ga. 75, 103 S.E.2d 108 (1958); *State Hwy. Dep't v. Wilson*, 98 Ga. App. 619, 106 S.E.2d 544 (1958); *Department of Transp. v. Garrett*, 154 Ga. App. 104, 267 S.E.2d 643 (1980).

RESEARCH REFERENCES

C.J.S. — 30 C.J.S., Eminent Domain, § 303.

PART 5

APPEALS AND FINAL JUDGMENT

JUDICIAL DECISIONS

This chapter concerns appeals from several different forms of condemnation proceedings and is necessarily general in its language. *DeKalb County v. Jackson-Atlantic Co.*, 123 Ga. App. 695, 182 S.E.2d 160 (1971).

Burden of proving value of land and consequential damages on condemnor. — The burden of proof to show the value of the land taken and the consequential damages to the remaining property, if any, is on the condemnor. *State Hwy. Dep't v. Smith*, 111 Ga. App. 292, 141 S.E.2d 590 (1965).

Condemnor chooses its method of procedure, and it is bound by the provisions of law following its own election. The property owner is also bound, although he did not choose the method of procedure. *Johnson v. Fulton County*, 103 Ga. App. 873, 121 S.E.2d 54 (1961).

Award of assessors is condition precedent to condemnor's appeal. — An award of compensation by assessors, filed as required by law, is a taking of private property for public use and payment must be made as a condition precedent to the condemnor's right to prosecute an appeal. *Arnold v. State Hwy. Dep't*, 116 Ga. App. 201, 156 S.E.2d 469 (1967).

Compensation the sole issue for jury on appeal. — In condemnation cases, the sole question for the consideration of the jury, upon an appeal from an award of the assessors or from an award of a special master, is the amount of compensation to be paid to the condemnee for the property taken under the condemnation proceeding and the amount of damages to the remaining property of the condemnee, if any. *State Hwy. Dep't v. Smith*, 111 Ga.

App. 292, 141 S.E.2d 590 (1965).

Motion to dismiss appeal in condemnation proceedings under Art. 3 of this chapter and Art. 6, Ch. 3, of this title, which is regulated by this part, falls in a different category from an oral motion to strike pleadings, amendments, or answers, since the motion to dismiss the appeal raises issues of fact. *Murray v. State Hwy. Dep't*, 103 Ga. App. 517, 120 S.E.2d 48 (1961).

Ruling on oral motion to strike motion to dismiss. — Trial court, in passing upon an oral motion to strike and dismiss the motion to dismiss an appeal in condemnation proceedings, can consider the evidence. *Murray v. State Hwy. Dep't*, 103 Ga. App. 517, 120 S.E.2d 48 (1961).

Contesting validity of condemnation proceedings. — Where a property owner participates in proceedings but refuses to take the award of the assessors, and where the property owner acted promptly after the award of the assessors was made by filing his petition in equity, alleging that the condemnor was proceeding illegally and had no right to condemn, and sought to enjoin the entering upon or taking possession of his property, the property owner is not estopped from contesting the validity of the condemnation proceedings. *Johnston v. Clayton County Water Auth.*, 222 Ga. 39, 148 S.E.2d 417 (1966).

Cited in *United States v. A Certain Tract or Parcel of Land*, 47 F. Supp. 30 (S.D. Ga. 1942); *State Hwy. Dep't v. Hendrix*, 215 Ga. 821, 113 S.E.2d 761 (1960); *Russell v. Venable*, 216 Ga. 137, 115 S.E.2d 103 (1960); *Harwell v. Georgia Power Co.*, 154 Ga. App. 142, 267 S.E.2d 769 (1980).

OPINIONS OF THE ATTORNEY GENERAL

Date of taking is date of special master's or assessor's award. 1970 Op. Att'y Gen. No. 70-116.

Appraisal to be updated to date of hearing before special master. — When condemnation is necessary, the appraiser should be instructed to update his appraisal to the date of the hearing before the special master; this appraisal should contemplate

that the amount of the award will be paid into court by condemnor within ten days of such hearing by the special master, and this is the amount that the appraiser should be prepared to testify to if and when there is an appeal of the matter to a jury in the superior court by either party thereto. 1970 Op. Att'y Gen. No. 70-116.

RESEARCH REFERENCES

ALR. — Condemnor's waiver, surrender, or limitation, after award, of rights or part of property acquired by condemnation, 5 ALR2d 724.

Spur track and the like as constituting a use for which railroad can validly exercise right of eminent domain, 35 ALR2d 1326.

Liability for costs on appeal relating to amount of condemnation award, 50 ALR2d 1386.

Right of adjoining landowners to

intervene in condemnation proceedings on ground that they might suffer consequential damage, 61 ALR2d 1292.

Right to open and close argument in trial of condemnation proceedings, 73 ALR2d 618.

Liability, upon abandonment of eminent domain proceedings, for loss or expenses incurred by property owner, or for interest on award or judgment, 92 ALR2d 355.

22-2-80. Appeal to jury in superior court — Generally.

In case either party is dissatisfied with the amount of the assessors' award, he or they may, within ten days from the time the award is filed, enter in writing an appeal from the award to the superior court of the county where the award is filed. At the term succeeding the filing of the appeal, it shall be the duty of the judge to cause an issue to be made and tried by a jury as to the value of the property or interest taken or the amount of damage done, with the same right to move for a new trial and file an appeal as in other cases at law. (Ga. L. 1894, p. 95, § 22; Civil Code 1895, § 4678; Civil Code 1910, § 5228; Code 1933, § 36-601.)

JUDICIAL DECISIONS

The Legislature intended to concern itself with time after which appeal may not be filed, with no regard to the time when filing is premature, except that of course the award of the assessors must be in existence, and the rights of the parties fixed, in order that there may be something to appeal from. The filing itself is not essential to the validity but only to the

enforceability of the award. *Hodges v. South Ga. Natural Gas Co.*, 111 Ga. App. 180, 141 S.E.2d 182 (1965).

Award of assessors, standing alone, is not judgment of court since the judgment is entered up by the court based on the award, but it is a judgment rendered by a tribunal which is competent to fix the rights and liabilities of the parties to the pro-

ceedings with reference to the matters and things involved. It can be amended only by permission of the court. *Hodges v. South Ga. Natural Gas Co.*, 111 Ga. App. 180, 141 S.E.2d 182 (1965).

Procedure provided for by this section is not a suit within the legal meaning of the term. *Hodges v. South Ga. Natural Gas Co.*, 111 Ga. App. 180, 141 S.E.2d 182 (1965).

Appeal entered after ten days from filing of award is properly dismissed. *Edwards v. Savannah & S. Ry.*, 140 Ga. 761, 79 S.E. 841 (1913).

Appeal not filed within the ten-day period is not timely and the proper judgment is one of dismissal. *City of Savannah Beach v. Thompson*, 135 Ga. App. 63, 217 S.E.2d 304 (1975).

Petition for removal of condemnation proceedings must be filed within the time allowed for appeals. *City of Toccoa v. Marchbanks*, 261 F. 684 (N.D. Ga. 1919).

Appeal may be entered by appellant's attorney. *Bibb Brick Co. v. Central of Ga. Ry.*, 151 Ga. 83, 105 S.E. 833 (1921).

No bond is necessary on appeal. *Alderman v. Valdosta, M. & W.R.R.*, 9 Ga. App. 526, 71 S.E. 931 (1911); *Bibb Brick Co. v. Central of Ga. Ry.*, 151 Ga. 83, 105 S.E. 833 (1921).

But appeal may be entered by city giving bond to the clerk of superior court. *Potts v. City of Atlanta*, 140 Ga. 431, 79 S.E. 110 (1913).

Judge's duty to bring issue to trial. — This section places the duty to bring the issue to trial squarely upon the judge; no burden is imposed on either party by the statute to insure that the case is timely tried. *Lackey v. DeKalb County*, 156 Ga. App. 309, 274 S.E.2d 705 (1980).

Appeal under this section is de novo investigation, and the defendant may file an appropriate defense thereto. *Central Ga. Power Co. v. Cornwell*, 139 Ga. 1, 76 S.E. 387, 1914A Ann. Cas. 880 (1912).

An appeal to the superior court from an award of assessors in a condemnation proceeding is a de novo investigation, if the assessors had jurisdiction over the subject matter and the parties. If the assessors do have such jurisdiction, the appeal will not be dismissed nor the case remanded, though the award be in fact a nullity. *Livsey*

v. Walton County, 47 Ga. App. 211, 170 S.E. 268 (1933).

The appeal from an appraisers' award on condemnation proceedings under this section brings the matter de novo to the jury on matters of value of the property taken and amount of damage done. *Tuggle v. De Kalb County*, 101 Ga. App. 890, 115 S.E.2d 751 (1960).

An appeal from an award of assessors is a trial de novo on the question of compensation, and it is the function and duty of the jury to pass upon the issues independently of the award of the assessors. *Chandler v. Alabama Power Co.*, 104 Ga. App. 521, 122 S.E.2d 317 (1961), rev'd on other grounds, 217 Ga. 550, 123 S.E.2d 767 (1962).

An appeal by either party entitles both parties to a de novo determination of the issue of the amount of a condemnee's award. *Smith v. Georgia Power Co.*, 131 Ga. App. 380, 205 S.E.2d 916 (1974).

The only method of correcting any errors the assessors or a special master may have made in the original hearing and award is not by recommittal to that body but by an appeal in the superior court, which begins again the process of adjudication. *City of Savannah Beach v. Thompson*, 135 Ga. App. 63, 217 S.E.2d 304 (1975).

Only issue on appeal is amount of compensation to be paid. — The issue on appeal cannot be broadened so as to raise questions other than those as to compensation. *Atlantic C.L.R.R. v. Postal Telegraph-Cable Co.*, 120 Ga. 268, 48 S.E. 15, 1 Ann. Cas. 734 (1904); *Atlanta Terra Cotta v. Georgia Ry. & Elec. Co.*, 132 Ga. 537, 64 S.E. 563 (1909).

In condemnation proceedings the only issue before the assessors or a jury on appeal is the amount of compensation to be paid, and neither the assessors nor a jury can determine whether the condemnor is proceeding legally; the remedy of the landowners is to apply to a court of equity to enjoin the illegal proceedings. *Garden Parks v. Fulton County*, 88 Ga. App. 97, 76 S.E.2d 31 (1953).

The sole question to be passed upon by the assessors, or a jury in the superior court on appeal, is the amount of compensation to be paid. Whether the quantity of land sought to be taken is necessary and proper

for the purpose for which it is sought is a question not involved in such a proceeding. *Johnson v. Fulton County*, 103 Ga. App. 873, 121 S.E.2d 54 (1961).

As a general rule the only issue before the jury relative to lands taken is its market value at the time of the taking. *State Hwy. Dep't v. Howell*, 119 Ga. App. 606, 168 S.E.2d 213 (1969).

While all relevant legal and equitable issues may be raised in an appeal from the assessors' award in a condemnation proceeding, the sole issue for the jury is value. All other issues, including the necessary fact finding, are for the determination of the court. *DeKalb County v. Jackson-Atlantic Co.*, 123 Ga. App. 695, 182 S.E.2d 160 (1971).

An appeal to the superior court jury is on the issue of value and damages alone. *City of Savannah Beach v. Thompson*, 135 Ga. App. 63, 217 S.E.2d 304 (1975).

An appeal from an award of assessors is a trial de novo on the question of compensation, and it is the function and duty of the jury to pass upon the issues independently of the award of the assessors. *DeKalb County v. Queen*, 135 Ga. App. 307, 217 S.E.2d 624 (1975).

Form of verdict on appeal from award of appraisers is not prescribed by statute. *Nalley Land & Inv. Co. v. State Hwy. Bd.*, 49 Ga. App. 258, 175 S.E. 269 (1934).

Award of jury shall be in money only, and no conditions can be attached thereto. *Darien & W.R.R. v. McKay*, 132 Ga. 672, 64 S.E. 785 (1909).

On appeal from the award of assessors in a statutory condemnation proceeding, the verdict should be for a given sum. *State Hwy. Bd. v. Warthen*, 54 Ga. App. 754, 189 S.E. 76 (1936).

Waiver of irregularities in proceedings. — Where the parties agreed to waive irregularities in proceedings to condemn a railroad right of way, these are not open on appeal. *Georgia G.R.R. v. Venable*, 129 Ga. 341, 58 S.E. 864 (1907).

Interest should be included as part of jury's award, for the jury, in reaching a verdict, should consider separately the various elements in respect to which they hear testimony, and their verdict is properly rendered for one sum. *State Hwy. Bd. v. Warthen*, 54 Ga. App. 759, 189 S.E. 76 (1936).

Tender or payment of award is necessary before property may be taken or the work thereon commenced. *Wilson v. State Hwy. Dep't*, 85 Ga. App. 907, 70 S.E.2d 535 (1952).

Payment to court equivalent of payment to owner, not owner's acceptance. — Payment into court is the equivalent of payment to the owner only insofar as the right to enter upon the property and prosecute the work under this section is concerned. It is not the equivalent of acceptance of the award by the owner nor of payment to him insofar as it affects his right to pursue his remedy in equity. *Williams v. City of La Grange*, 213 Ga. 241, 98 S.E.2d 617 (1957).

Procedure substantially the same for appeals from assessors' award and justice's court. — Substantially the same procedure is provided in cases of appeal from an award of assessors in a condemnation proceeding to the superior court as is provided in cases of appeal from a justice's court to the superior court. *State Hwy. Bd. v. Long*, 61 Ga. App. 173, 6 S.E.2d 130 (1939).

Amendments and readjustments of petitions authorized on appeal. — On the appeal from the award of the appraisers, it is the duty of the judge to cause an issue to be made, and that in itself authorizes amendments and readjustments of the petitions in so far as they do not disturb the actual property involved. *Tuggle v. De Kalb County*, 101 Ga. App. 890, 115 S.E.2d 751 (1960).

Including amendment of acreage description. — Where land to be condemned is accurately described by metes and bounds but the acreage description is not completely accurate, the acreage description may be changed by amendment on appeal of the appraisers' award, and such change is no ground for dismissing the appeal. *Tuggle v. De Kalb County*, 101 Ga. App. 890, 115 S.E.2d 751 (1960).

Award of assessors is not proper evidence for consideration of jury on an appeal in a condemnation case. *Chandler v. Alabama Power Co.*, 104 Ga. App. 521, 122 S.E.2d 317 (1961), rev'd on other grounds, 217 Ga. 550, 123 S.E.2d 767 (1962);

DeKalb County v. Queen, 135 Ga. App. 307, 217 S.E.2d 624 (1975).

Except for purpose of impeaching appraiser's testimony. — The award of the assessors may be admitted for the limited purpose of impeaching the testimony of one of the appraisers. DeKalb County v. Queen, 135 Ga. App. 307, 217 S.E.2d 624 (1975).

Withdrawal of appeal not allowed without consent of adverse party. — Where an appeal is taken from an award of assessors to the superior court, the condemnor shall not be allowed to withdraw an appeal after it shall be entered, but by the consent of the adverse party. State Hwy. Bd. v. Long, 61 Ga. App. 173, 6 S.E.2d 130 (1939).

Section 22-2-112 is copied verbatim from this section and consequently has the same meaning. Johnson v. Fulton County, 103 Ga. App. 873, 121 S.E.2d 54 (1961).

Section 22-2-112 dealing with an appeal from the award of the special master, and this section dealing with appeals from awards of assessors in eminent domain cases, are in identical language and must be given the same meaning. City of Savannah Beach v. Thompson, 135 Ga. App. 63, 217 S.E.2d 304 (1975).

Appeal from award of arbitrators governed by Title 9. — Notwithstanding a provision in an agreement submitting issues to arbitration under §§ 9-9-4 and 9-9-48, that the arbitrators should proceed "as in condemnation proceedings," and providing for an "appeal" from the award to the superior court, the award of the arbitrators was a statutory award, to be governed by Title 9, not this title. Georgia Power Co. v. Friar, 47 Ga. App. 675, 171 S.E. 210 (1933), *aff'd*, 179 Ga. 470, 175 S.E. 807 (1934).

Condemnee should be allowed to show rental income from property, not for the purpose of being compensated for lost future revenue, but for the purpose of showing the use and location as affecting the value of the property. DeKalb County v. Queen, 135 Ga. App. 307, 217 S.E.2d 624 (1975).

Where jury tries case upon appeals of both condemnor and condemnee, the trial is valid and binding, assuming that the appeal of the condemnor is invalid and

alone would not give the court jurisdiction. Liberson v. City of Atlanta, 98 Ga. App. 255, 105 S.E.2d 376 (1958).

Liability for interest on difference between assessors' award and final judgment. — Where the amount of the final judgment is less than the award made by the assessors, the condemnee is not liable for the payment of interest on the difference in the amount of the award and the judgment except from the date of the judgment. City of Atlanta v. Lunsford, 105 Ga. App. 247, 124 S.E.2d 493 (1962).

Where tenth day following assessor's award falls on Saturday and condemnee files appeal two days thereafter, the entry of a judgment on an assessor's award only two days after the award was filed is premature. McAllister v. City of Jonesboro, 151 Ga. App. 260, 259 S.E.2d 666 (1979).

In appeal from assessment after land has been condemned to establish new road which alters an existing road, the burden is upon the property owner, in order to establish any consequential damage which may have been sustained by him from a discontinuance of the old road, to show that the old road has been discontinued in the manner prescribed by law. Wellmaker v. Lamar County Advisory Bd., 43 Ga. App. 816, 160 S.E. 708 (1931).

Cited in Savannah, F. & W. Ry. v. Postal Telegraph-Cable Co., 112 Ga. 941, 38 S.E. 353 (1901); Denham v. State Hwy. Bd., 52 Ga. App. 790, 184 S.E. 631 (1936); Stewart v. Board of Comm'rs, 66 Ga. App. 108, 17 S.E.2d 203 (1941); United States v. 340 Acres of Land, 54 F. Supp. 457 (S.D. Ga. 1944); State Hwy. Dep't v. Peavy, 77 Ga. App. 308, 48 S.E.2d 478 (1948); Hagans v. Excelsior Elec. Membership Corp., 207 Ga. 53, 60 S.E.2d 162 (1950); Wilson v. State Hwy. Dep't, 85 Ga. App. 907, 70 S.E.2d 535 (1952); Olliff v. Housing Auth., 89 Ga. App. 43, 78 S.E.2d 549 (1953); Murray v. State Hwy. Dep't, 103 Ga. App. 517, 120 S.E.2d 48 (1961); State Hwy. Dep't v. Hester, 112 Ga. App. 51, 143 S.E.2d 658 (1965); Adams v. Housing Auth., 117 Ga. App. 646, 161 S.E.2d 444 (1968); Hinton v. Georgia Power Co., 126 Ga. App. 416, 190 S.E.2d 811 (1972); Taylor v. Georgia Power Co., 129 Ga. App. 89, 198 S.E.2d 701 (1973); James v. Housing Auth., 233 Ga. 447, 211 S.E.2d 738 (1975).

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Appeal and Error, §§ 146, 188, 258. 27 Am. Jur. 2d, Eminent Domain, §§ 407, 408, 448, 468-472.

C.J.S. — 30 C.J.S., Eminent Domain, §§ 276-291, 306-318, 343-372.

ALR. — Provision for taking or retaining possession pending appeal in condemnation proceeding, 55 ALR 201.

Right of court to reduce or increase award in condemnation and confirm it as reduced or increased, 61 ALR 194.

Right to intervene in court review of zoning proceeding, 46 ALR2d 1059.

Admissibility, in eminent domain proceeding, of evidence as to price paid for

condemned real property during pendency of the proceeding, 55 ALR2d 781.

Admissibility, in eminent domain proceeding, of evidence as to price paid for condemned real property on sale prior to the proceeding, 55 ALR2d 791.

Right of adjoining landowners to intervene in condemnation proceedings on ground that they might suffer consequential damage, 61 ALR2d 1292.

How to obtain jury trial in eminent domain: waiver, 12 ALR3d 7.

Eminent domain: recovery of value of improvements made with knowledge of impending condemnation, 98 ALR3d 504.

22-2-81. Same — Effect of appeal on condemnor’s right to use condemned property or interest; payment, tender, etc., of award as condition on condemnor’s right to use property or interest.

The entering of an appeal and the proceedings thereon shall not hinder or delay in any way the condemnor’s right to use the condemned property or interest, provided that the condemnor pays or tenders to the owner the amount of the award and, in case of the refusal of the owner to accept the award, deposits the amount awarded with the clerk of the superior court for the benefit of the owner. (Ga. L. 1894, p. 95, § 23; Civil Code 1895, § 4679; Civil Code 1910, § 5229; Code 1933, § 36-602.)

Law reviews. — For comment on Georgia Power Co. v. Fountain, 207 Ga. 361, 61 S.E.2d 454 (1950), see 13 Ga. B.J. 341 (1951).

JUDICIAL DECISIONS

Award by assessors binding until reversed or set aside. — An award by condemnation assessors and the order and judgment of the court directing the filing thereof are judgments rendered by a competent tribunal, and, even if erroneous, are binding upon a condemnee until reversed or set aside, and cannot be collaterally attacked in the condemnee’s equitable petition for injunction against the condemnor’s contractor. *McGreggor v. W.L. Florence Constr. Co.*, 208 Ga. 176, 65 S.E.2d 809 (1951).

Cited in *Central Ga. Power Co. v. Stone*, 142 Ga. 662, 83 S.E. 524 (1914); *Gaston v. Shunk Plow Co.*, 161 Ga. 287, 130 S.E. 580 (1925); *Georgia Power Co. v. Fountain*, 207 Ga. 361, 61 S.E.2d 454 (1950); *Olliff v. Housing Auth.*, 89 Ga. App. 43, 78 S.E.2d 549 (1953); *Mitchell v. State Hwy. Dep’t*, 216 Ga. 517, 118 S.E.2d 88 (1961); *Robinson v. Transcontinental Gas Pipe Line Corp.*, 306 F. Supp. 201 (N.D. Ga. 1969).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Eminent Domain, § 469.

C.J.S. — 29A C.J.S., Eminent Domain, §§ 192, 221. 30 C.J.S., Eminent Domain, § 329.

ALR. — Eminent domain: payment or deposit of award in court as affecting condemnor's right to appeal, 40 ALR3d 203.

22-2-82. Same — Effect of tender, payment, or acceptance of assessors' award on right of appeal; effect of discrepancy between award and final judgment.

The tender, payment, or acceptance of the award shall not prevent either party from prosecuting the appeal. If the amount awarded by the assessors is less than that found by the final judgment, the person seeking condemnation shall be bound to pay the sum so finally adjudged in order to retain the property or interest. If the amount of the final judgment is less than that awarded by the assessors, the owner shall be bound to refund any excess paid to or received by him; and a judgment for such excess shall be rendered against him to be collected by levy as in other cases. (Ga. L. 1894, p. 95, § 24; Civil Code 1895, § 4680; Civil Code 1910, § 5230; Code 1933, § 36-603.)

JUDICIAL DECISIONS

Prayer seeking to enjoin appeal cannot be maintained where the plaintiff has an available remedy at law under this section. *Bibb Brick Co. v. Central of Ga. Ry.*, 150 Ga. 65, 102 S.E. 521 (1920).

Effect of amendment on appeal alleging tender. — An amendment on appeal, alleging tender and acceptance of an assessment operates as a waiver of any irregularity in the notice and assessment. *Georgia G.R.R. v. Venable*, 129 Ga. 341, 58 S.E. 864 (1907).

Liability for interest on difference between assessors' award and final judgment. — Where the amount of the final judgment is less than the award made by the assessors, the condemnee is not liable for the payment of interest on the difference in the amount of the award and the judgment except from the date of the judgment. *City of Atlanta v. Lunsford*, 105 Ga. App. 247, 124 S.E.2d 493 (1962).

Interest on award withdrawn by condemnee held improper. — Where the condemnor paid into the registry of the

court the sum awarded to the condemnee by the appointed assessors, and the court paid the sum to the condemnee, the condemnor appealed from the assessors' award, and the court entered judgment for the condemnor for the difference between the assessors' award and the jury's verdict, the award of interest at 7 percent per annum from the date the condemnee withdrew the award from the court was improper. *Fletcher v. State Hwy. Dep't*, 105 Ga. App. 251, 124 S.E.2d 755 (1962).

Error in instruction on computation of interest cured. — While the court erred in instructing the jury that interest should be computed from the date of the award, as the amount of the award of the assessors was paid, and the interest on the difference between the amount of the verdict and the amount tendered should have been computed from the date of the tender, and not from the date of the award, the error was fully cured and rendered harmless to the plaintiff by the defendants writing off all possible interest that the jury could have

computed on the damages awarded by them, in excess of the amount of the original award, from the date of that award to the date of the verdict. *State Hwy. Bd. v. Warthen*, 54 Ga. App. 759, 189 S.E. 76 (1936).

Jury verdict larger than assessor's award. — See *Atlanta, B. & A.R.R. v. Smith*, 132 Ga. 725, 64 S.E. 1073 (1909).

Cited in *Atlanta Terra Cotta Co. v.*

Georgia Ry. & Elec. Co., 132 Ga. 537, 64 S.E. 563 (1909); *Central of Ga. Power Co. v. Stone*, 142 Ga. 662, 83 S.E. 524 (1914); *Wilson v. State Hwy. Dep't*, 85 Ga. App. 907, 70 S.E.2d 535 (1952); *First Nat'l Bank v. State Hwy. Dep't*, 219 Ga. 144, 132 S.E.2d 263 (1963); *Sadtler v. City of Atlanta*, 236 Ga. 396, 223 S.E.2d 819 (1976).

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Appeal and Error, § 258.

C.J.S. — 29A C.J.S., Eminent Domain, § 194.

ALR. — Provision for taking or retaining possession pending appeal in condemnation proceeding, 55 ALR 201.

Condemnor's right, as against condemnee, to interest on excessive money deposited in court or paid to condemnee, 99 ALR2d 886.

Eminent domain: payment or deposit of award in court as affecting condemnor's right to appeal, 40 ALR3d 203.

22-2-83. Issuance of execution on award or judgment.

If the condemnor fails to pay the amount of the award or judgment within ten days after the same is filed or entered, then the clerk shall issue execution upon such award or judgment which may be levied upon any property of the condemnor. (Ga. L. 1894, p. 95, § 25; Civil Code 1895, § 4681; Civil Code 1910, § 5231; Code 1933, § 36-604.)

JUDICIAL DECISIONS

Condemnee entitled to file award and have execution issued. — A condemnee was under the provisions of this section entitled, when the condemnor's appeal was dismissed, to file the award of the appraisers in the clerk of the superior court's office and have an execution issued on it. *Towler v. State Hwy. Dep't*, 100 Ga. App. 374, 111 S.E.2d 154 (1959).

This section does not treat award and final judgment as same thing. *Georgia Power Co. v. Selman*, 87 Ga. App. 323, 73 S.E.2d 597 (1952).

And execution of award may not be arrested by affidavit of illegality. — Since the award of appraisers in a condemnation proceeding is not a judgment of a court, an execution issued thereon may not be arrested by an affidavit of illegality. *Georgia Power Co. v. Selman*, 87 Ga. App.

323, 73 S.E.2d 597 (1952).

Effect of subsequent independent suit by condemnee on appraisers' award. — The filing of a suit by a condemnee independently of condemnation proceedings and subsequently to the award of the appraisers, in which latter case the condemnee sought to obtain a general judgment for damages, did not affect the right of the condemnee to proceed to have an execution issued on the award in the manner prescribed by this section. The award could, according to § 9-2-44(a), have been pleaded to the subsequent damage suit, since the obtaining of the valid award of the appraisers, which award was in the nature of a judgment, prevented a further suit on the same cause of action, except such proceeding as was necessary to enforce the award. The award and the pro-

ceedings to enforce it were exhaustive of the condemnee's rights in the premises, and no legal judgment could have been

rendered in the same. *Towler v. State Hwy. Dep't*, 100 Ga. App. 374, 111 S.E.2d 154 (1959).

RESEARCH REFERENCES

C.J.S. — 30 C.J.S., Eminent Domain, § 332.

22-2-84. Entry of notice and award on minutes of court; payments to assessors by condemnor; payment of other costs by assessors; exemption of state, etc., from operation of Code section.

(a) In all cases, the clerk shall enter the notice and award thereon upon the minutes of the court, and the condemnor shall pay:

(1) To each assessor, \$10.00 for each day or any fraction thereof, provided that upon showing of extraordinary services or expenses the judge of the superior court may award costs in excess of the above amount for each day or fraction thereof devoted by each assessor to any case; and

(2) Other costs as provided by law in civil cases in the superior court.

(b) In any case in which any county of this state having a population of 300,000 or more according to the present or any future United States census condemns any property or any interest therein lying within the limits of such county, said county so condemning shall pay to each assessor such costs as shall be fixed in the case by the judge of the superior court, not to exceed \$25.00 for each day or fraction thereof devoted by such assessor to the case.

(c) The State of Georgia and its political subdivisions shall be exempt from this Code section, except as otherwise provided in this Code section. (Ga. L. 1894, p. 95, § 26; Civil Code 1895, § 4682; Civil Code 1910, § 5232; Code 1933, § 36-605; Ga. L. 1949, p. 1404, § 1; Ga. L. 1955, p. 651, §§ 1, 2.)

JUDICIAL DECISIONS

Requirement of payment of costs is for benefit of officers of court and not a condition precedent to the filing of an appeal. *Hilderbrand v. Housing Auth.*, 109 Ga. App. 297, 136 S.E.2d 24 (1964).

Clerk is not bound to receive appeal until costs have been paid to him, but if the clerk does receive an appeal without exacting the costs, the appeal is good, and

the clerk becomes estopped from saying that the costs have not been paid to him — estopped as to all persons, at least, except the appellant. *Hilderbrand v. Housing Auth.*, 109 Ga. App. 297, 136 S.E.2d 24 (1964).

Failure of condemnor to pay costs and fees within 10 days after judgment does not vitiate its appeal therefrom regardless

of whether or not it is a political subdivision of the state. *Hilderbrand v. Housing Auth.*, 109 Ga. App. 297, 136 S.E.2d 24 (1964).

Waiver of right to have costs paid in advance. — Where a magistrate refuses to dismiss an appeal because costs have not been paid by the appellant, this amounts to a waiver of his right to have the costs paid

in advance, and the appellee has no right to complain of the refusal to dismiss the appeal. *Hilderbrand v. Housing Auth.*, 109 Ga. App. 297, 136 S.E.2d 24 (1964).

Cited in *Kellett v. Fulton County*, 215 Ga. 551, 111 S.E.2d 364 (1959); *Murray v. State Hwy. Dep't*, 103 Ga. App. 517, 120 S.E.2d 48 (1961).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Eminent Domain, § 473.

C.J.S. — 30 C.J.S., Eminent Domain, § 305.

ALR. — Liability for costs in trial tribunal in eminent domain proceedings as affected by offer or tender by condemnor, 70 ALR2d 804.

22-2-85. Extent of interest obtainable by condemnor upon condemnation.

Upon the payment by the condemnor of the amount of the award, or the amount of the final judgment if there is an appeal, the condemnor shall become vested with such interest in the property taken as may be necessary to enable the condemnor to exercise his franchise or conduct his business. Whenever the condemnor ceases using the property taken for the purpose of conducting his business, the property shall revert to the person from whom taken, his heirs or assigns. Notwithstanding any other provision of this Code section, whenever any municipality condemns land for protection against floods and freshets, that municipality may acquire a fee simple title to the property condemned on payment of the condemnation money. When such municipality has a population of more than 250,000 according to the last or any future decennial census of the United States, such municipality, or the county in which the major portion of such municipality is located, shall acquire a fee simple title to the property condemned upon payment of the condemnation money. (Ga. L. 1894, p. 95, § 27; Civil Code 1895, § 4683; Civil Code 1910, § 5233; Ga. L. 1914, p. 61; Code 1933, § 36-606; Ga. L. 1945, p. 690, § 1; Ga. L. 1975, p. 1148, § 1.)

Cross references. — As to vesting of fee simple title in municipal or county housing

authority upon exercise of power of eminent domain, see § 8-3-10.

JUDICIAL DECISIONS

Use of condemned property. — The appropriation to public use amounts to a withdrawal only from such private uses as will interfere with the public use. Private use is of course to be subordinated to the

public use, but, where the fee remains in the owner, he is entitled to make any use of the property which is not inconsistent with its use for the purpose for which it was taken. *H.G. Hastings Co. v. Southern Nat-*

ural Gas Corp., 45 Ga. App. 774, 166 S.E. 56 (1932).

Condemned property reverts to owner if purpose permanently ceases. — The clause in this section relating to the reverter of the condemned use means that if the use of the condemned property in the business to be served permanently ceases, the property is not to be used for other purposes, but the easement ceases or reverts to the then owners of the servient land. *Florida Blue Ridge Corp. v. Tennessee Elec. Power Co.*, 106 F.2d 913 (5th Cir. 1939), cert. denied, 309 U.S. 666, 60 S. Ct. 591, 84 L. Ed. 1013 (1940).

Although no deed need be executed, it will control if one is given. *City of Atlanta v. Jones*, 135 Ga. 376, 69 S.E. 571 (1910).

Term "right of way" as used in § 22-1-6 is limited by this section, so that it is descriptive of the tenure only. A county may construct a highway thereon. *Atlanta, B. & A. Ry. v. County of Coffee*, 152 Ga. 432, 110 S.E. 214 (1921). See also *Georgia G.R.R. v. Venable*, 129 Ga. 341, 58 S.E. 864 (1907).

Condemnation of land abutting street. — The property of a land owner abutting a street may be condemned, although his interest in said street is not. *Bridwell v. Gate City Term. Co.*, 127 Ga. 520, 56 S.E. 624, 10 L.R.A. (n.s.) 909 (1907).

When corporation acquires right to use

property by condemnation under this section, the condemnation does not vest in the condemnor only a personal right of use during the life or ownership of the condemnor, but vests the interest condemned in the condemnor just as though it had been conveyed to it. *Florida Blue Ridge Corp. v. Tennessee Elec. Power Co.*, 106 F.2d 913 (5th Cir. 1939), cert. denied, 309 U.S. 666, 60 S. Ct. 591, 84 L. Ed. 1013 (1940).

When business is transferred to another who continues to use condemned property as before, the condemnor is still using it through his transferee, even though he die, or be dissolved if a corporation and the right to the use of the property acquired through condemnation does not cease. *Florida Blue Ridge Corp. v. Tennessee Elec. Power Co.*, 106 F.2d 913 (5th Cir. 1939), cert. denied, 309 U.S. 666, 60 S. Ct. 591, 84 L. Ed. 1013 (1940).

Cited in *Central of Ga. Ry. v. Lawley*, 33 Ga. App. 375, 126 S.E. 273, cert. denied, 33 Ga. App. 828 (1925); *State Hwy. Dep't v. H.G. Hastings Co.*, 187 Ga. 204, 199 S.E. 793 (1938); *State Hwy. Dep't v. Peavy*, 204 Ga. 99, 48 S.E.2d 726 (1948); *Taylor v. Georgia Power Co.*, 129 Ga. App. 89, 198 S.E.2d 701 (1973); *Department of Transp. v. Garrett*, 154 Ga. App. 104, 267 S.E.2d 643 (1980).

RESEARCH REFERENCES

Am. Jur. 2d. — 26 Am. Jur. 2d, Eminent Domain, §§ 130-133, 145-149.

C.J.S. — 29A C.J.S., Eminent Domain, § 191. 30 C.J.S., Eminent Domain, §§ 449-461.

ALR. — Reversion of title upon abandonment or vacation of public street or highway, 18 ALR 1008.

Right to interest in condemnation proceedings during owner's retention of possession, 32 ALR 98.

Provision for taking or retaining possession pending appeal in condemnation proceeding, 55 ALR 201.

Title of interest acquired by railroad in

exercise of eminent domain as fee or easement, 155 ALR 381.

Condemnation, proceeding therefor, or prospect thereof, as affecting marketability of title, 21 ALR2d 792.

Who, as between condemnor and condemnee, bears risk of loss or destruction of property occurring after commencement but before completion of eminent domain proceedings, 89 ALR2d 1076.

Right to condemn property in excess of needs for a particular public purpose, 6 ALR3d 297.

22-2-86. Manner of payment where owner a minor or under disability and without a legal representative.

If the person entitled to payment of the award or judgment is a minor or under any disability and has no legal representative entitled to receive the money, the money shall be paid to the judge of the probate court of the county, who shall at once cause the money to be invested. To this end, the judge of the probate court of the county of the disabled owner's residence shall appoint a guardian or other proper representative to receive the money and manage the property in which it may be invested. (Ga. L. 1894, p. 95, § 28; Civil Code 1895, § 4684; Civil Code 1910, § 5234; Code 1933, § 36-607.)

RESEARCH REFERENCES

ALR. — Personal liability of purchaser of property subject to chattel mortgage, to the mortgagee, 100 ALR 1038.

ARTICLE 2

PROCEEDING BEFORE SPECIAL MASTER

Cross references. — As to succession by masters in superior courts of state, see § 9-7-1.
auditors to duties previously performed by

JUDICIAL DECISIONS

Article does not violate state Constitution. — This article, which provides procedures for the condemnation of private property for public use by the state and other political entities, does not as a whole violate the prohibition against taking land for public purposes without just compensation as this article provides an adequate method for determining the value of property sought to be taken and for just and adequate compensation to be first paid. *O.K., Inc. v. State Hwy. Dep't*, 213 Ga. 666, 100 S.E.2d 906 (1957).

This article meets due process requirements in that it gives the condemnee notice as well as reasonable opportunity for preparation and for a hearing. Due process requirements are satisfied if he has a reasonable notice and opportunity to be heard, and to present his claim or defense, due regard being had to the nature of the

proceeding and the character of the rights which may be affected by it. *Brown v. Georgia Power Co.*, 134 Ga. App. 784, 216 S.E.2d 613 (1975).

Due process requirements are satisfied by this article in that it gives the condemnee notice as well as an opportunity for a hearing. *Sweat v. Georgia Power Co.*, 235 Ga. 281, 219 S.E.2d 384 (1975).

Legislature has provided adequate method for determining compensation. — The Legislature, by enacting §§ 22-2-102, 22-2-108, and 22-2-112, has provided an adequate method for determining the just and adequate compensation of property sought to be condemned under this article, and § 22-2-110 of the act in no wise limits the master to an arbitrary finding. *Kellett v. Fulton County*, 215 Ga. 551, 111 S.E.2d 364 (1959).

Constitutional guarantee of trial by jury does not extend to eminent domain proceedings. *Sweat v. Georgia Power Co.*, 235 Ga. 281, 219 S.E.2d 384 (1975).

Purpose of this article is to provide for speedy ascertainment of just and adequate compensation under the supervision of the superior court, and in such a role the special master is simply an extension of the court, appointed by it as a semi-judicial assistant. *West End Whse., Inc. v. Dunlap*, 141 Ga. App. 333, 233 S.E.2d 284 (1977).

The purpose of this article is to provide a simpler and more effective method of condemnation where there is a necessity for a quick determination or where, for several reasons, a judicial supervision is desirable. *Fountain v. Marta*, 147 Ga. App. 465, 249 S.E.2d 296 (1978).

This article provides cumulative and summary method for condemnation of property. *Johnson v. Fulton County*, 103 Ga. App. 873, 121 S.E.2d 54 (1961).

And it attempts to achieve more perfect conciliation between parties by providing for the use of experienced, competent attorneys as special masters. *Brown v. Georgia Power Co.*, 371 F. Supp. 543 (S.D. Ga. 1973).

But special master's rulings may be excepted to by trial court and disposed of in like manner before any award, which is the end product of the proceeding, is offered to the court and a judgment of taking is entered up based on the award. *Brown v. Georgia Power Co.*, 371 F. Supp. 543 (S.D. Ga. 1973).

This article is not controlled by Civil Practice Act, (Ch. 11, T. 9) but is a special statutory proceeding. *Roberts v. Wise*, 140 Ga. App. 1, 230 S.E.2d 320 (1976).

Special master procedure is in rem proceeding which contains no requirement of negotiation. *Harwell v. Georgia Power Co.*, 154 Ga. App. 142, 267 S.E.2d 769 (1980).

Procedure not available for taking property previously dedicated to public use. — In absence of express authority, the condemning procedure authorized by this article is not available for use by condemnors who seek to take property previously dedicated to a public use. *Georgia S. & F. Ry. v. City of Warner Robins*, 107 Ga. App. 370, 130 S.E.2d 151 (1963).

Condemnor chooses its method of procedure, and it is bound by the provisions of law following its own election. The property owner is also bound, although he did not choose the method of procedure. *Johnson v. Fulton County*, 103 Ga. App. 873, 121 S.E.2d 54 (1961).

Condemnor has no rights except those expressly granted to it by statute, and those rights can be exercised only when every prerequisite to their exercise has been fully met. *Johnson v. Fulton County*, 103 Ga. App. 873, 121 S.E.2d 54 (1961).

Large discretion is vested in condemnor in selection of property to be condemned, and such selection should not be interfered with or controlled by the courts, unless made in bad faith, or capriciously or wantonly injurious, or in some respect beyond the privilege conferred by statute or its charter. *Miles v. Brown*, 223 Ga. 557, 156 S.E.2d 898 (1967).

Determination of necessity of taking and of rights of condemnee. — This article vests a broad discretion in the condemning authority as to the necessity for the taking and provides that other matters material to the rights of the condemnee generally will be determined under proper pleadings in the pending condemnation proceedings. *Miles v. Brown*, 223 Ga. 557, 156 S.E.2d 898 (1967).

Private company possessing power of eminent domain is authorized to employ condemnation procedure of this article. *Nodvin v. Georgia Power Co.*, 125 Ga. App. 821, 189 S.E.2d 118 (1972).

State-created entity not authorized to condemn for public purposes. — Where the condemnor is not the state, or a part of the state or an agency of the state but a creature created by the state, it is not authorized to condemn property in its own name for public purposes under this article. *Scarlett v. Georgia Ports Auth.*, 223 Ga. 417, 156 S.E.2d 77 (1967).

Condemnor may take and use property after required preliminary procedures. — Under this article, the condemning body, after the required preliminary procedures, may take the property, use it, and proceed to change it to a degree that irrevocable harm could be done before the issue of incompatible use is determined. *Georgia S. & F. Ry. v. City of Warner Robins*, 107 Ga. App. 370, 130 S.E.2d 151 (1963).

Statutory construction where procedural provisions incomplete. — Where wording is taken from a prior statute, or where this article fails to be complete within itself, then reference to provisions for proceedings before assessors is permitted to fill in the void. *Johnson v. Fulton County*, 103 Ga. App. 873, 121 S.E.2d 54 (1961).

Property owner not entitled to hearing on necessity of taking. — The necessity or expediency of taking property for public use is a legislative question upon which the owner is not entitled to a hearing under U.S. Const., Amend. 14 and Ga. Const. 1976, Art. I, Sec. I, Para. I. *Miles v. Brown*, 223 Ga. 557, 156 S.E.2d 898 (1967).

Nor can owner defeat condemnation proceeding by injunction petition. — The owner of private property cannot, by petition for injunction, defeat a condemnation proceeding or litigate the issue that the property sought to be condemned is being condemned for private rather than public purposes; such issue must be litigated in the condemnation proceeding. *Reeves v. City of Atlanta*, 216 Ga. 592, 118 S.E.2d 378 (1961).

Owner of land cannot prevent condemnation because there is other property which might be suitable for purpose. *Miles v. Brown*, 223 Ga. 557, 156 S.E.2d 898 (1967).

Burden of proving value of land and consequential damages on condemnor. — The burden of proof to show the value of the land taken and the consequential damages to the remaining property, if any, is on the condemnor. *State Hwy. Dep't v. Smith*, 111 Ga. App. 292, 141 S.E.2d 590 (1965).

Weight of evidence of property value before and after condemnation. — Evidence of the difference between the value of the whole property (that taken and that not taken) before a taking and after the taking is without probative value as to the actual value of the land taken and the consequential damage to that not taken. *State Hwy. Dep't v. Mann*, 110 Ga. App. 390, 138 S.E.2d 610 (1964).

Exceptions to findings of special master. — When legal objections are raised before and passed upon by the special master, to obtain review of these objections exceptions must be taken to the master's findings prior to the superior court's entry

of an order and judgment condemning the property; additionally, if either party is dissatisfied with the master's award as regards value, they may, within ten days from the time the award is filed, enter in writing an appeal from the award to the superior court and it shall be the duty of the judge to cause an issue to be made and tried by a jury. *Parlato v. City of Atlanta*, 151 Ga. App. 235, 259 S.E.2d 217 (1979).

This article limits appeal to question of value only, and provides that all other issues including the right to condemn, the interest condemned, and everything else preliminary to the actual vesting of title should be decided at the first hearing. *Johnson v. Fulton County*, 103 Ga. App. 873, 121 S.E.2d 54 (1961); *Brown v. Georgia Power Co.*, 371 F. Supp. 543 (S.D. Ga. 1973).

In condemnation cases, the sole question for the consideration of the jury, upon an appeal from an award of the assessors or from an award of a special master, is the amount of compensation to be paid to the condemnee for the property taken under the condemnation proceeding and the amount of damages to the remaining property of the condemnee, if any. *State Hwy. Dep't v. Smith*, 111 Ga. App. 292, 141 S.E.2d 590 (1965).

Appellate review of question of what property interest is taken in a condemnation under the special master procedure is allowed when properly raised and preserved. *Harwell v. Georgia Power Co.*, 154 Ga. App. 142, 267 S.E.2d 769 (1980).

Action for recovery of damages resulting from condemnor's negligence is not proper in condemnation proceedings. *Georgia Power Co. v. Jones*, 122 Ga. App. 614, 178 S.E.2d 265 (1970).

There is no law permitting recovery of damages to personalty as such on appeal of a finding by the special master fixing value of real property alone. *State Hwy. Dep't v. Mann*, 110 Ga. App. 390, 138 S.E.2d 610 (1964).

Cited in *Anthony v. State Hwy. Dep't*, 215 Ga. 853, 113 S.E.2d 768 (1960); *Fulton County v. Aronson*, 216 Ga. 497, 117 S.E.2d 166 (1960); *State Hwy. Dep't v. Smith*, 219 Ga. 800, 136 S.E.2d 334 (1964); *State Hwy. Dep't v. Respass*, 111 Ga. App. 421, 142 S.E.2d 73 (1965); *Avary v. City of*

Atlanta, 221 Ga. 76, 143 S.E.2d 183 (1965); *Bowers v. Fulton County*, 221 Ga. 731, 146 S.E.2d 884 (1966); *Donehoo v. Fulton County*, 116 Ga. App. 368, 157 S.E.2d 323 (1967); *City of Atlanta v. Airways Parking Co.*, 225 Ga. 173, 167 S.E.2d 145 (1969); *State Hwy. Dep't v. Howard*, 119 Ga. App. 298, 167 S.E.2d 177 (1969); *Phillips v. Georgia Power Co.*, 225 Ga. 289, 168

S.E.2d 150 (1969); *Jones v. Georgia Power Co.*, 225 Ga. 510, 169 S.E.2d 810 (1969); *DeKalb County v. Jackson-Atlantic Co.*, 123 Ga. App. 695, 182 S.E.2d 160 (1971); *White v. Georgia Power Co.*, 237 Ga. 341, 227 S.E.2d 385 (1976); *City of Atlanta v. First Nat'l Bank*, 154 Ga. App. 658, 269 S.E.2d 878 (1980); *White v. Georgia Power Co.*, 247 Ga. 256, 274 S.E.2d 565 (1981).

OPINIONS OF THE ATTORNEY GENERAL

It is responsibility of special master to establish value of property condemned, and nothing more; his duty is to assess the value of the property taken or damaged, and also to assess the consequential damages and benefits to the property not taken. 1969 Op. Att'y Gen. No. 69-494.

Date of taking is date of special master's or assessor's award. 1970 Op. Att'y Gen. No. 70-116.

Appraisal to be updated to date of hearing before special master. — When condemnation is necessary, the appraiser should be instructed to update his appraisal to the date of the hearing before the special master; this appraisal should contemplate that the amount of the award will be paid into court by condemnor within ten days of such hearing by the special master, and this is the amount that the appraiser should be

prepared to testify to if and when there is an appeal of the matter to a jury in the superior court by either party thereto. 1970 Op. Att'y Gen. No. 70-116.

Payment of city or county taxes is not proper element of damages in condemnation case. 1969 Op. Att'y Gen. No. 69-494.

Responsibility for payment of taxes on condemned property. — The payment of property taxes is a responsibility of the landowner only so long as he, in fact, owns the property. The property owner or condemnee would be responsible for payment of taxes up to the date of taking; after that time, the responsibility for the payment of these taxes would lie upon the condemning body, if in fact that body is an entity which would have the responsibility for payment of these taxes. 1969 Op. Att'y Gen. No. 69-494.

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Eminent Domain, §§ 375-380, 409.

C.J.S. — 29A C.J.S., Eminent Domain, §§ 209-221. 30 C.J.S., Eminent Domain, §§ 276-280, 292-305.

ALR. — Limitation applicable to action or proceeding by owner for compensation where property is taken in exercise of eminent domain without antecedent condemnation proceeding, 123 ALR 676.

Condemnor's waiver, surrender, or limitation, after award, of rights or part of property acquired by condemnation, 5 ALR2d 724.

Right to open and close argument in trial

of condemnation proceedings, 73 ALR2d 618.

Good will as element of damages for condemnation of property on which private business is conducted, 81 ALR3d 198.

Necessity of trial or proceeding separate from main condemnation trial or proceeding, to determine divided interest in state condemnation award, 94 ALR3d 696.

Unsuitability of powerline or other wire, or related structure, as element of damages in easement condemnation proceeding, 97 ALR3d 587.

22-2-100. “Condemning body” and “condemnor” defined.

As used in this article, “condemning body” or “condemnor” means:

- (1) The State of Georgia or any branch of the government of the State of Georgia;
- (2) Any county or municipality of the State of Georgia;
- (3) Any housing authority;
- (4) Any other political subdivision of the State of Georgia which is vested with the power of eminent domain; and
- (5) All other persons possessing the right or power of eminent domain. (Ga. L. 1957, p. 387, § 1; Ga. L. 1962, p. 461, § 1; Ga. L. 1967, p. 825, § 1.)

JUDICIAL DECISIONS

Legislative intent of 1967 amendment
was to vest power companies which supply electricity to the public with the power to condemn in fee simple for public purposes and subject to the protective statutory procedures provided in the act. *Harwell v. Georgia Power Co.*, 246 Ga. 203, 269 S.E.2d 464 (1980).

This article is ample authority for power company to condemn in fee simple whenever it can show a public purpose and necessity. *Harwell v. Georgia Power Co.*, 246 Ga. 203, 269 S.E.2d 464 (1980).

22-2-101. Effect of article on other methods of condemnation; intent of article.

This article shall be supplementary to and cumulative of the methods of condemnation described in Articles 1 and 3 of this chapter in cases in which the state, or any branch of the government of the state, or any county, municipality, or other political subdivision of the state, or any housing authority, or any other person possessing the power of eminent domain is concerned. This article is intended to provide a simpler and more effective method of condemnation in those cases where a judicial supervision of the proceedings is desirable by reason of the necessity for a quick determination of the just and adequate compensation to be paid the owner of the property or interest subject to be condemned, or by reason of the number of parties at interest or the conflicting interests of such parties, or in cases where there are parties who are non compos mentis or who are not sui juris or who are nonresidents, or in cases where there are conflicting interests or doubtful questions. In all particulars not otherwise specially provided for in this article, the court shall conform its procedure as nearly as possible to Articles 1 and 3 of this chapter. (Ga. L. 1957, p. 387, § 2.)

JUDICIAL DECISIONS

Purpose of this article is to provide an effective method of condemnation where judicial supervision of the procedure is desirable. *Golfland, Inc. v. Thomas*, 107 Ga. App. 563, 130 S.E.2d 757 (1963).

The primary purpose of special master proceeding under this article is to secure a quick determination of the compensation to be paid. *City of Savannah Beach v. Thompson*, 135 Ga. App. 63, 217 S.E.2d 304 (1975).

The special master method of condemnation is intended to be an expeditious method of arriving at a just and adequate compensation to be paid a citizen before his interest in property may be condemned. Such is accomplished by having a special master appointed to hear evidence as to the value of the property taken and damage done and then to make an award upon which the superior court can enter a judgment immediately vesting title in the condemnor upon payment of the amount awarded. *Shoemaker v. Department of*

Transp., 240 Ga. 573, 241 S.E.2d 820 (1978).

This article does not repeal other statutory provisions for condemnation of property but is supplementary to and cumulative of them. *City of Gainesville v. Loggins*, 116 Ga. App. 548, 158 S.E.2d 287 (1967), rev'd on other grounds, 224 Ga. 114, 160 S.E.2d 374 (1968).

Cited in *Johnson v. Fulton County*, 103 Ga. App. 873, 121 S.E.2d 54 (1961); *Leach v. Georgia Power Co.*, 228 Ga. 16, 183 S.E.2d 755 (1971); *Nodvin v. Georgia Power Co.*, 125 Ga. App. 821, 189 S.E.2d 118 (1972); *Smith v. Georgia Power Co.*, 131 Ga. App. 380, 205 S.E.2d 916 (1974); *Zuber Lumber Co. v. City of Atlanta*, 237 Ga. 358, 227 S.E.2d 362 (1976); *Fourth Nat'l Bank v. Grant*, 140 Ga. App. 78, 230 S.E.2d 60 (1976); *Atlanta Whses., Inc. v. Housing Auth.*, 143 Ga. App. 588, 239 S.E.2d 387 (1977); *Allen v. Hall County*, 156 Ga. App. 629, 275 S.E.2d 713 (1980).

22-2-102. Filing of petition of condemnation; order for parties to appear before special master, make known their rights or interests, etc.; time of hearing before special master; directions for notice and service thereof; attachment of process to petition; cause to proceed in rem.

Whenever it is desirable, for any reason, to arrive at a quick and certain determination of the compensation to be paid first to the condemnee for the taking or damaging of private property, the condemnor shall file a petition in a superior court having jurisdiction for a judgment in rem against the property or interest therein, as provided in Code Section 22-2-130. At or before the filing of the petition, the condemnor shall present a copy of the petition to a judge of the superior court of the county wherein the property or interest sought to be condemned is located. Thereupon, the judge shall make an order requiring the condemnor, the person in possession of the property or interest, and any other person known to have any rights in the property or interest to appear at a hearing before a special master at a time and place specified in the order and to make known their rights, if any, in and to the property or interest sought to be condemned, their claims as to the value of the property or interest, and any other matters material to their respective rights. The hearing before the special master shall take place not less than

ten days nor more than 15 days after the date of service of the order. The order shall give such directions for notice and the service thereof as are appropriate and as are consistent with this article, in such manner as to provide most effectively an opportunity to all parties at interest to be heard. It shall not be necessary to attach any other process to the petition except the order so made, and the cause shall proceed as in rem. (Ga. L. 1957, p. 387, § 5.)

JUDICIAL DECISIONS

Procedure satisfies due process. — This section supplemented by §§ 22-2-107 and 22-2-108 provides reasonable notice and opportunity for a condemnee to be heard and therefore satisfies the constitutional provisions as to due process. *Kellett v. Fulton County*, 215 Ga. 551, 111 S.E.2d 364 (1959).

Condemnation by special master is expeditious method of arriving at just and adequate compensation to be paid a citizen before his interest in property may be condemned. Such is accomplished by having a special master appointed to hear evidence as to the value of the property taken and the damage done and then to make an award upon which the superior court can enter a judgment immediately vesting title in the condemnor upon payment of the amount awarded. *Shoemaker v. Department of Transp.*, 240 Ga. 573, 241 S.E.2d 820 (1978); *Allen v. Hall County*, 156 Ga. App. 629, 275 S.E.2d 713 (1980).

All legal issues relating to condemnation may be raised and determined in special master proceeding. If no exceptions are taken to the master's findings or no regular appeal taken from the judgment based on his award, the only issue remaining is that of value. *Allen v. Hall County*, 156 Ga. App. 629, 275 S.E.2d 713 (1980).

Functions of special master. — Though the primary duty of the special master is to ascertain the value of the property sought to be condemned, the special master is authorized to hear and determine any legal objections that may be raised by the parties, including, the right of the condemnor to condemn, the interest, the nature of the interest taken and the effect of the con-

demnation upon the respective rights of the parties. *Shoemaker v. Department of Transp.*, 240 Ga. 573, 241 S.E.2d 820 (1978); *Allen v. Hall County*, 156 Ga. App. 629, 275 S.E.2d 713 (1980).

Condemnor vested with broad discretion as to necessity of taking. — It is clear that in enacting this article, the General Assembly intended to vest a very broad discretion in the condemning authority as to the necessity for the taking, and that "other matters material" to the rights of condemnees generally might be determined under proper pleadings in the case. *City of Carrollton v. Walker*, 215 Ga. 505, 111 S.E.2d 79 (1959).

And as to selection of property. — A large discretion is vested in a party having the right to condemn, in the selection of particular property to be condemned. *Zuber Lumber Co. v. City of Atlanta*, 237 Ga. 358, 227 S.E.2d 362 (1976).

Time for filing of defensive pleadings (as opposed to their sufficiency) is governed by the special statutory procedure of this article. *Nodvin v. Georgia Power Co.*, 125 Ga. App. 821, 189 S.E.2d 118 (1972).

Amendment of petition to provide more specific description. — A condemnor may amend its petition by striking two paragraphs describing the proposed right of way and the uses of the right of way, and stating two new paragraphs, where all that the amendment does is to put the condemnees on notice of a more specific description of the right of way sought to be condemned and the proposed use of the right of way. *Leach v. Georgia Power Co.*, 228 Ga. 16, 183 S.E.2d 755 (1971).

Proceeding under general civil practice rules cannot follow final adjudication. — Where there has been a final adjudication

in a special master condemnation proceeding which is designed to be expeditious, a party may not later tender an answer to the petition under general rules of civil practice. *Nodvin v. Georgia Power Co.*, 125 Ga. App. 821, 189 S.E.2d 118 (1972).

Judicial review of master's findings. — If the special master makes findings not only as to just and adequate compensation for the property taken but also as to other matters material to the condemnee's respective rights, the proper method for the condemnee to obtain judicial review of the special master's findings in regard to matters other than the just and adequate compensation for the property taken is to file objections to the special master's award prior to the court entering an order and making the award a judgment of the court. *Georgia Power Co. v. Baggarley*, 133 Ga. App. 399, 211 S.E.2d 23 (1974).

When legal objections are raised before and passed upon by the special master, to obtain review of these objections exceptions must be taken to the master's findings prior to the superior court's entry of an order and judgment condemning the property. If no exceptions are taken and the master's findings are made the judgment of the court, the court's judgment is final insofar as it adjudicates these legal issues, until set aside or reversed in a manner provided by law. *Allen v. Hall County*, 156 Ga. App. 629, 275 S.E.2d 713 (1980).

Condemnation award and judgment, unexcepted to and unappealed from, is res judicata as to the issue of the existence and length of any leasehold interest. Therefore, the judgment in the condemnation proceeding is conclusive to all nonvalue issues raised on appeal. *Allen v. Hall County*, 156 Ga. App. 629, 275 S.E.2d 713 (1980).

Description of property sought held sufficiently definite. — The condemnor's description of the right of way sought to be condemned was sufficiently definite when the petition (a) described with certainty the entire tract of land through which the right of way was to pass, (b) described the right of way in metes, bounds and distances, (c) described minutely the proposed construction of poles, lines, etc., for the transmission of electric current, and (d) included a plat showing the property sought to be condemned. *Leach v. Georgia Power Co.*, 228 Ga. 16, 183 S.E.2d 755 (1971).

Cited in *Johnson v. Fulton County*, 103 Ga. App. 873, 121 S.E.2d 54 (1961); *Wiggins v. City of Macon*, 120 Ga. App. 197, 169 S.E.2d 667 (1969); *Leach v. Georgia Power Co.*, 228 Ga. 16, 183 S.E.2d 755 (1971); *City of Savannah Beach v. Thompson*, 135 Ga. App. 63, 217 S.E.2d 304 (1975); *Atlanta Whses., Inc. v. Housing Auth.*, 143 Ga. App. 588, 239 S.E.2d 387 (1977).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Eminent Domain, §§ 390-394.

C.J.S. — 29A C.J.S., Eminent Domain, §§ 186-192, 196-205, 218, 219, 236, 242-249. 30 C.J.S., Eminent Domain, §§ 276-279, 292.

ALR. — Right to intervene in court review of zoning proceeding, 46 ALR2d 1059.

22-2-103. Appointment of special master — Generally.

The special master provided for in this article shall be appointed by the judge or judges of the superior courts of each judicial circuit and shall discharge the duties provided for in this article. Nothing contained in this article shall be construed as limiting the number of special masters for the circuit, and any judge of the superior court may appoint a special master

for any particular case or cases. The special master so appointed must be a competent attorney at law, be of good standing in his profession, and have at least three years' experience in the practice of law. His relation and accountability to the court shall be that of an auditor or master in the general practice existing in this state. He shall hold office at the pleasure of the judge and shall be removable at any time with or without cause. Each special master shall take and file in the office of the clerk of the superior court of the county of his residence, along with the order of his appointment, an oath or affidavit substantially in the form prescribed in Code Section 22-2-105. (Ga. L. 1957, p. 387, § 6.)

Cross references. — As to auditors generally, see Ch. 7, T. 9.

JUDICIAL DECISIONS

Special master is officer of court. — The original arbiter is no longer merely a person especially equipped to determine value; he is a competent attorney under oath especially appointed by the court. He is, accordingly, an arm of the court, and his decision is judicial or at least quasi-judicial. *Johnson v. Fulton County*, 103 Ga. App. 873, 121 S.E.2d 54 (1961).

A special master is a judicial officer within contemplation of the immunity doctrine. *West End Whse., Inc. v. Dunlap*, 141 Ga. App. 333, 233 S.E.2d 284 (1977).

Rulings of neither auditor nor special master are immediately final. *Wiggins v. City of Macon*, 120 Ga. App. 197, 169 S.E.2d 667 (1969); *Sweat v. Georgia Power Co.*, 235 Ga. 281, 219 S.E.2d 384 (1975).

Special master's rulings and findings may be excepted to in trial court and disposed of in like manner before any award, which is the end product of the proceeding, is offered to the court and a judgment of

taking is entered up based on the award. *Wiggins v. City of Macon*, 120 Ga. App. 197, 169 S.E.2d 667 (1969).

This section obviously contemplates the possibility of exceptions and an appeal thereon to the superior court. *Sweat v. Georgia Power Co.*, 235 Ga. 281, 219 S.E.2d 384 (1975).

Special master not obligated to report findings and conclusions. — Although the relationship and accountability of a special master to the court is that of an auditor, a special master is not obligated by this section to render a report in the manner prescribed in § 9-7-8 containing his findings and conclusions upon the law and the facts. *Sweat v. Georgia Power Co.*, 235 Ga. 281, 219 S.E.2d 384 (1975).

Cited in *Leach v. Georgia Power Co.*, 228 Ga. 16, 183 S.E.2d 755 (1971); *Zuber Lumber Co. v. City of Atlanta*, 237 Ga. 358, 227 S.E.2d 362 (1976).

OPINIONS OF THE ATTORNEY GENERAL

District attorney should not serve as special master in a condemnation case. 1970 Op. Att'y Gen. No. U70-39.

RESEARCH REFERENCES

C.J.S. — 30 C.J.S., Eminent Domain,
§§ 293-295.

22-2-104. Same — Form to be used in appointing special master.

Substantially, the following form should be used in appointing a special master:

_____, a competent attorney at law, residing in the _____ Judicial Circuit, and of at least three years' experience in the practice of law, is hereby appointed a special master in and for the _____ Judicial Circuit, to discharge the duties of special master as provided in the condemnation law of this state. This appointment is _____ (either for general duties or for a particular case, as the case may be).

This _____ day of _____, 19____.

Judge, Superior Court

(Ga. L. 1957, p. 387, § 7.)

22-2-105. Same — Oath of special master.

The special master is required to take the following oath to be filed along with the order of his appointment in the office of the clerk of the superior court of the county of his residence:

I, _____, do swear that I will faithfully, well, and truly perform the duties of special master under the condemnation law, according to law and to the best of my skill and ability.

Sworn to and subscribed before me this _____ day of _____, 19____.

(Title and authority of attesting officer)

(Ga. L. 1957, p. 387, § 8.)

22-2-106. Compensation of special master; allowance by judge of reasonable time for special master to inspect premises.

(a) The compensation of the special master shall be provided for by a proper order of the judge of the superior court; shall be included in and made a part of the judgment of the court condemning the property or any interest therein sought to be taken, such judgment to be based on the award of the special master; shall be paid by the condemning body; and shall not be less than \$50.00 per day nor more than \$250.00 per day for the time actually devoted to the hearing and consideration of the matter by the special master.

(b) The judge may allow the special master a reasonable period of time for personal inspection of the premises and may compensate the special master for his time spent inspecting the premises and for any actual expenses incurred by him in connection with the inspection, provided that the special master shall file an affidavit with the court showing his time spent in inspection and itemizing his expenses. (Ga. L. 1957, p. 387, § 9; Ga. L. 1975, p. 27, § 1.)

JUDICIAL DECISIONS

Compensation cannot exceed maximum statutory amount unless the actual time spent on one particular case is more than

one normal working day period. *City of Gainesville v. Smith*, 121 Ga. App. 117, 173 S.E.2d 225 (1970).

OPINIONS OF THE ATTORNEY GENERAL

District attorney should not serve as special master in a condemnation case.

1970 Op. Att'y Gen. No. U70-39 (decided under Ga. L. 1968, p. 992, as amended).

RESEARCH REFERENCES

C.J.S. — 30 C.J.S., Eminent Domain, § 305.

tribunal in eminent domain proceedings as affected by offer or tender by condemnor,

ALR. — Liability for costs in trial

70 ALR2d 804.

22-2-107. Service of process; award by special master and judgment of court conclusive as to right of condemnor to take or damage property or interest.

(a) Copies of the petition, together with the order of the court provided for in Code Section 22-2-102, shall in all cases be served upon the person in possession of the property or interest sought to be condemned and upon all persons who are known to have any rights in such property or interest.

(b) The return of service signed by the sheriff or his lawful deputy, or an affidavit of service executed by any citizen of this state, reciting that a copy of the petition and order was served upon the named condemnee in person or by leaving a copy at the place of his residence, shall be sufficient evidence as to the service of the named condemnee. It shall be the duty of the sheriff or citizen, as the case may be, to cause service to be made within three days from the date of the order of the judge on the petition.

(c) If any of the condemnees or other persons known to have any rights in the property or interest reside outside of the county, the judge shall order service to be made upon such party or parties. Such service shall be perfected by causing a copy of the petition and order to be served upon the party or parties by the sheriff or any lawful deputy of the county of the residence of the party or parties. In addition, service may be made by any citizen. The return of such sheriff or lawful deputy, or the affidavit of such citizen that the party or parties were served, either in person or by leaving a copy of the petition and order at the residence, shall be conclusive as to service.

(d) The sheriff or any lawful deputy of the county where the petition is filed shall serve nonresidents of this state:

(1) By posting a copy of the petition, together with the order of the judge thereon, on the bulletin board at the courthouse door of the county in which the property or interest sought to be condemned is located for not less than five days prior to the time of the hearing before the special master;

(2) By the insertion of a notice identifying the property or interest sought to be condemned, as well as the date and place of the hearing before the special master, in a newspaper having general circulation in the county wherein such property or interest is located, for one issue of said paper, the date of which shall be not less than four nor more than seven days prior to the hearing before the special master, and which is the same newspaper in which the sheriff's advertisements are carried; and

(3) Where the address of such nonresidents is known, by mailing to them by registered or certified mail a copy of the petition and order.

(e) If any of the persons entitled to service under this Code section are minors, or insane persons, or persons otherwise laboring under disabilities, the guardian or other personal representative of such persons shall be served. If the guardian or personal representative resides outside of the county or is a nonresident, he shall be served as provided in subsections (c) and (d) of this Code section. If such minor or other person laboring under disabilities has no guardian or personal representative, service shall be perfected by serving the disabled person personally or, in

the event the disabled person lives outside of the county or is a nonresident, by serving the disabled person by the method provided in subsections (c) and (d) of this Code section for other persons who live outside of the county or are nonresidents, and by serving the judge of the probate court of the county wherein such property or interest is located, who shall stand in the place of and protect the rights of the disabled person or appoint a guardian ad litem for such person.

(f) In the event of unknown persons or unborn remaindermen who are likely to have any rights in the property or interest or the proceeds thereof, the judge of the probate court of the county wherein such property or interest is located shall be served with a copy of the petition and order; and it shall be his duty to stand in the place and protect the rights of such unknown parties or unborn remaindermen.

(g) The purpose of this article being to quicken and simplify the condemnation proceeding in all cases where the public good requires it and to provide for a condemnation in rem against the property or interest required to be taken or damaged and insofar as is reasonably possible to protect the rights of all parties to be heard at the time of the hearing before the special master, a substantial and reasonable effort to comply with the various modes of service provided for in this Code section shall be sufficient. Insofar as concerns the right of the condemning body to take or damage the property or any interest therein, upon the payment of the amount awarded by the special master into the registry of the court, the award of the special master and the judgment of the court condemning the property or interest to the use of the condemning body shall be conclusive. (Ga. L. 1957, p. 387, § 10; Ga. L. 1966, p. 388, § 1.)

JUDICIAL DECISIONS

Procedure satisfies due process. — Section 22-2-102 supplemented by this section and § 22-2-108 provides reasonable notice and opportunity for a condemnee to be heard and therefore satisfies the constitutional provisions as to due process. *Kellett v. Fulton County*, 215 Ga. 551, 111 S.E.2d 364 (1959).

Provisions for service on nonresidents formerly denied due process. — The portion of § 36-610a which purported to provide for posting, publishing, and mailing notices to known nonresident owners, denied due process by not naming anyone to post, publish, or mail the notice therein referred to. *Ray v. Mayor of Athens*, 221 Ga. 73, 143 S.E.2d 386 (1965) (decided prior to amendment of this section by Ga. L. 1966, p. 388, § 1).

Judgment of superior court on master's report is final judgment not subject to readjudication in the superior court. Being a final judgment it is appealable if at all directly to the appellate courts under the provisions of § 5-6-34 by bill of exceptions on the record made before the special master; if it is not so appealable there is a hiatus in the law which it is the duty of the Legislature and not the judiciary to supply. *Johnson v. Fulton County*, 103 Ga. App. 873, 121 S.E.2d 54 (1961).

Once the sanction of the court is received, by the judge of the superior court accepting the master's report and entering up a proper order and judgment condemning the described property, and once this act has been ratified by the condemnor upon the payment into the

registry of the court of the amount provided for in the award that judgment is final and conclusive on the question of what property or interest therein has been condemned. *Johnson v. Fulton County*, 103 Ga. App. 873, 121 S.E.2d 54 (1961).

Fee simple title to condemned property vests in condemnor. *Johnson v. Fulton County*, 103 Ga. App. 873, 121 S.E.2d 54 (1961).

Taking is complete upon payment of award to court. — In a special master proceeding under this section and § 22-2-110, the taking is complete upon the award of the special master and payment into court of the amount determined. *Roberts v. Wise*, 140 Ga. App. 1, 230 S.E.2d 320 (1976).

There is no right to appeal from special master award to jury on nonvalue issues. *Sweat v. Georgia Power Co.*, 235 Ga. 281, 219 S.E.2d 384 (1975).

Appellate review of question of what property interest has been taken is not

barred by the last sentence of this section. *Harwell v. Georgia Power Co.*, 154 Ga. App. 142, 267 S.E.2d 769 (1980).

Court has discretion to vacate order where notice of condemnation insufficient. — The trial court has a discretion at the term at which the judgment disbursing funds is entered to vacate the order and reopen the case where it is shown to the court's satisfaction that the claimant had received no notice of the condemnation proceedings. *Roberts v. Wise*, 140 Ga. App. 1, 230 S.E.2d 320 (1976).

Participation in hearing waived objection to defect in service. — Where the appellants participated in the special master hearing on the date that it was held, they could not complain about lack of service and notice of the hearing. *Taylor v. Taylor County*, 231 Ga. 209, 200 S.E.2d 887 (1973).

Cited in *Atlanta Whses., Inc. v. Housing Auth.*, 143 Ga. App. 588, 239 S.E.2d 387 (1977).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Eminent Domain, §§ 393, 394.

C.J.S. — 29A C.J.S., Eminent Domain, §§ 196-204, 236, 242-249. 30 C.J.S., Eminent Domain, §§ 327-329. 72 C.J.S., Pro-

cess, §§ 43 et seq., 73, 74.

ALR. — Condemnor's right, as against condemnee, to interest on excessive money deposited in court or paid to condemnee, 99 ALR2d 886.

22-2-108. Powers and duties of special master generally.

The special master shall serve in lieu of a board of assessors; and his duties and authority, except as otherwise provided for in this article, shall be the same as provided by Code Sections 22-2-61 through 22-2-63. The special master shall hold the hearing provided for in Code Section 22-2-102 at the time and place provided by the order of the judge of the superior court and in compliance with the duties and authority conferred by this article. The special master shall not be authorized to continue or delay the hearing, except as otherwise provided by Code Section 9-10-150, relating to granting continuances by reason of membership in the General Assembly during sessions thereof, or except upon the written order of the judge of the superior court; and such a continuance shall be granted only for good cause shown to that judge. When it shall be necessary for the judge to grant a continuance, the continuance shall be for not more than five days from the date of the order granting the continuance. (Ga. L. 1957, p. 387, § 11; Ga. L. 1973, p. 479, § 1.)

JUDICIAL DECISIONS

Procedure satisfies due process. — Section 22-2-102 supplemented by § 22-2-107 and this section provides reasonable notice and opportunity for a condemnee to be heard and therefore satisfies the constitutional provisions as to due process. *Kellett v. Fulton County*, 215 Ga. 551, 111 S.E.2d 364 (1959).

Duty of special master. — The primary duty of the special master is to ascertain the value of the property sought to be condemned and the consequential damages or benefits, if any, with the authority to hear and determine any legal objections raised by the parties. *Leach v. Georgia Power Co.*, 228 Ga. 16, 183 S.E.2d 755 (1971).

The primary duty of the special master is to ascertain the total amount in money that will be equivalent to "just and adequate compensation" for the property and the interests in property being taken by the condemnor. *Zuber Lumber Co. v. City of Atlanta*, 237 Ga. 358, 227 S.E.2d 362 (1976).

Issues to be resolved by special master. — All issues as to the right of the condemnor to condemn, the interest to be condemned, the nature of the interest taken, and the effect of the condemnation upon the respective rights of the parties are to be resolved by the special master. *State Hwy. Dep't v. Thomas*, 115 Ga. App. 372,

154 S.E.2d 812 (1967).

Exceptions to findings of special master required for review. — Where legal objections or issues are raised before and passed upon by the special master, to obtain a review in the pending condemnation case exceptions must be taken to the orders of the special master. *Leach v. Georgia Power Co.*, 228 Ga. 16, 183 S.E.2d 755 (1975).

When no exceptions are taken to master's finding and it is made judgment of court, it is final until set aside or reversed in a manner provided by law. *State Hwy. Dep't v. Thomas*, 115 Ga. App. 372, 154 S.E.2d 812 (1967).

Statutory construction where procedural provisions incomplete. — Where wording is taken from a prior statute, or where this article fails to be complete within itself, then reference to provisions for proceedings before assessors is permitted to fill in the void. *Johnson v. Fulton County*, 103 Ga. App. 873, 121 S.E.2d 54 (1961).

Condemnee is not required to litigate tort claim as part of condemnation proceeding where special master was not empowered to hear such claim. *Georgia Power Co. v. Johnson*, 155 Ga. App. 862, 274 S.E.2d 17 (1980).

Cited in *Nodvin v. Georgia Power Co.*, 125 Ga. App. 821, 189 S.E.2d 118 (1972); *Atlanta Whses., Inc. v. Housing Auth.*, 143 Ga. App. 588, 239 S.E.2d 387 (1977).

OPINIONS OF THE ATTORNEY GENERAL

It is responsibility of special master to establish value of property condemned, and nothing more; his duty is to assess the value of the property taken or damaged, and also to assess the consequential damages and benefits to the property not taken. 1969 Op. Att'y Gen. No. 69-494.

Payment of city or county taxes is not proper element of damages in condemnation case. 1969 Op. Att'y Gen. No. 69-494.

Responsibility for payment of taxes on condemned property. — The payment of

property taxes is a responsibility of the landowner only so long as he, in fact, owns the property. The property owner or condemnee would be responsible for payment of taxes up to the date of taking; after that time, the responsibility for the payment of these taxes would lie upon the condemning body, if in fact that body is an entity which would have the responsibility for payment of these taxes. 1969 Op. Att'y Gen. No. 69-494.

RESEARCH REFERENCES

Am. Jur. 2d. — 26 Am. Jur. 2d, Eminent Domain, §§ 151, 152. 27 Am. Jur. 2d, Eminent Domain, §§ 266-296, 310-320, 357-374, 419-442.

C.J.S. — 29A C.J.S., Eminent Domain, §§ 104-185, 271-275. 30 C.J.S., Eminent Domain, §§ 276-279, 296-304.

ALR. — Right to intervene in court review of zoning proceeding, 46 ALR2d 1059.

Right of adjoining landowners to intervene in condemnation proceedings on ground that they might suffer consequential damage, 61 ALR2d 1292.

Power of successor or substituted master or referee to render decision or enter judgment on testimony heard by predecessor, 70 ALR3d 1079.

22-2-109. Factors to be considered in determining or estimating just and adequate compensation; determination of date of taking; inclusion of date of approval of original location of highway in petition for condemnation; newspaper advertisement as to original location of highway, date of location, etc.

(a) In determining or estimating just and adequate compensation to be paid to the owner of any property or interest condemned for public road and street purposes, neither the special master nor the jury, in the event of an appeal to a jury, shall be restricted to the agricultural or productive qualities of the land; but inquiry shall be made as to all other legitimate purposes to which the land could be appropriated. The date of taking as contemplated in this Code section shall be the date of the filing of the condemnation proceedings for the acquisition of the property or interest.

(b) The condemning authority shall cause the petition for condemnation to set forth the date of the approval of the original location of the highway. It shall be the further duty of the condemning authority, within 30 days from the date of the original approval and designation of said location as a highway, to cause the location of said highway in said county to be advertised once each week for four consecutive weeks in the newspaper of the county in which the sheriff's advertisements are carried; and said advertisement shall designate the land lots or land districts of said county through which such highway will be located. Said advertisement shall further show the date of the said original location of such highway as hereinbefore provided for in this subsection. Said advertisement shall further state that a plat or map of the project showing the exact date of original location is on file at the office of the Department of Transportation, and that any interested party may obtain a copy of same by writing to the Department of Transportation (2 Capitol Square, Atlanta, Georgia 30334) and paying a nominal cost therefor.

(c) In determining just and adequate compensation for property or interests taken or condemned for public road and street purposes, the award of the special master or the verdict of the jury, in the event of an appeal, shall, in addition to fixing the value of the land actually taken and

used for such purposes, take into consideration the prospective and consequential damages to the remaining property or interest from which the property or interest actually taken was cut off, which consequential damages result to such remaining property or interest because of the location of such public road or street upon the portion actually taken. In addition, the increase of the value of such remaining property or interest from the location of such public road or street shall be considered. Such consequential benefits, if any, may be offset against such consequential damages, if any; but in no event shall consequential benefits be offset against the value of the property or interest taken for such public improvement. (Ga. L. 1966, p. 320, § 2.)

Cross references. — For further provisions regarding condemnation of property for public road purposes, see § 32-3-4 et seq.

Law reviews. — For comment on State Hwy. Dep't v. Lumpkin, 222 Ga. 727, 152 S.E.2d 557 (1966), see 3 Ga. St. B.J. 483 (1967).

JUDICIAL DECISIONS

What is just and adequate compensation is justiciable question, and only the judiciary can lawfully determine that question. Calhoun v. State Hwy. Dep't, 223 Ga. 65, 153 S.E.2d 418 (1967).

There are only two elements of damages to be considered in condemnation proceeding: first, the market value of the property actually taken; second, the consequential damage that will naturally and proximately arise to the remainder of the owner's property from the taking of the part which is taken and the devoting of it to the purposes for which it is condemned. Simon v. Department of Transp., 245 Ga. 478, 265 S.E.2d 777 (1980).

Anything that actually enhances value of land must be considered in order to meet the constitutional demand that the owner be paid before the taking, adequate and just compensation. Department of Transp. v. Arnold, 154 Ga. App. 502, 268 S.E.2d 775 (1980).

There are three recognized techniques for determining market value: replacement cost new less depreciation, income, and comparable sales. Housing Auth. v. Southern Ry., 245 Ga. 229, 264 S.E.2d 174 (1980).

Measure of consequential damages if any, to the property which the condemnee retains, is the market value of the remainder in its circumstances just prior to

the time of the taking, as compared with its market value in its new circumstances just after the time of the taking. Simon v. Department of Transp., 245 Ga. 478, 265 S.E.2d 777 (1980).

Compensable damage must differ in kind from damage to general public. — Damage suffered by the condemnee which is different from that suffered by the general public in degree only, and not in kind, is not compensable or recoverable. Dougherty County v. Snelling, 132 Ga. App. 540, 208 S.E.2d 362 (1974), overruled on other grounds, Zuber Lumber Co. v. City of Atlanta, 237 Ga. 358, 227 S.E.2d 362 (1976).

Land and its natural components are one subject matter and what is required is evidence of the fair market value of that one subject matter. Department of Transp. v. Brooks, 153 Ga. App. 386, 265 S.E.2d 610 (1980).

Improvements on land are proper subjects for independent valuation in consideration of the just and adequate compensation for the total property taken. Department of Transp. v. Brooks, 153 Ga. App. 386, 265 S.E.2d 610 (1980).

Existing zoning regulations can be pertinent in a condemnation proceeding. Department of Transp. v. Brooks, 153 Ga. App. 386, 265 S.E.2d 610 (1980).

Attorneys' fees need not be included in the measure of just compensation under the Georgia Constitution. *Georgia Power Co. v. Sanders*, 617 F.2d 1112 (5th Cir. 1980).

Lost profits may be used as means of awarding just and adequate compensation because the income approach necessarily takes into account what future earnings would be were the property interest not extinguished. *Housing Auth. v. Southern Ry.*, 245 Ga. 229, 264 S.E.2d 174 (1980).

Change in traffic pattern. — Adjoining owners of property or operators of businesses on property adjoining a street or highway have no vested interest in the traffic pattern which controlling authorities may provide for the public street from time to time. If they suffer damage when the pattern is changed it is a damage suffered by members of the general public owning property or operating businesses adjacent to a street or highway, and for which there can be no recovery. The damage is not peculiar to the condemnees. *Dougherty County v. Snelling*, 132 Ga. App. 540, 208 S.E.2d 362 (1974), overruled on other grounds, *Zuber Lumber Co. v. City of Atlanta*, 237 Ga. 358, 227 S.E.2d 362 (1976).

Property is "unique" where fair market value will not afford just compensation. — Since valuing property at its fair market value presupposes a willing buyer and a willing seller, properties are "unique" such that fair market value will not afford just and adequate compensation when they are not of a type generally bought or sold in the open market. *Housing Auth. v. Southern Ry.*, 245 Ga. 229, 264 S.E.2d 174 (1980).

Whether or not property is unique is a jury question. *Dixie Hwy. Bottle Shop, Inc. v. Department of Transp.*, 150 Ga. App. 839, 258 S.E.2d 646 (1979); *Department of Transp. v. Dixie Hwy. Bottle Shop, Inc.*, 245 Ga. 314, 265 S.E.2d 10 (1980).

"Unique" property is measured by variety of nonfair market methods of valuation, including the cost and income methods. *Housing Auth. v. Southern Ry.*, 245 Ga. 229, 264 S.E.2d 174 (1980).

Recovery of business losses. — Business losses are recoverable as a separate item only if the property is "unique." *Department of Transp. v. Dixie Hwy. Bottle Shop,*

Inc., 245 Ga. 314, 265 S.E.2d 10 (1980).

When a business belongs to the landowner, total destruction of the business at the location must be proven before business losses may be recovered as a separate element of compensation. *Department of Transp. v. Dixie Hwy. Bottle Shop, Inc.*, 245 Ga. 314, 265 S.E.2d 10 (1980).

When the business belongs to a separate lessee, the lessee may recover for business losses as an element of compensation separate from the value of the land whether the destruction of his business is total or merely partial, provided only that the loss is not remote or speculative. *Department of Transp. v. Dixie Hwy. Bottle Shop, Inc.*, 245 Ga. 314, 265 S.E.2d 10 (1980).

Enhancement or impairment of value and lost profits not part of market value.

— The enhancement or impairment of value of the land, or the loss of profits resulting from the announcement of condemnation proceedings are no part of market value for the purposes of just and adequate compensation. *R.E. Adams Properties, Inc. v. City of Gainesville*, 125 Ga. App. 800, 189 S.E.2d 114 (1972).

Loss of established business separate item from value of building. — The loss of an established business is a separate and distinct item from the amount which a condemnee is entitled under this chapter to recover as the actual value of his building. *R.E. Adams Properties, Inc. v. City of Gainesville*, 125 Ga. App. 800, 189 S.E.2d 114 (1972).

Jury consideration of actual value of land. — While there may be circumstances in which the market value of the total property and the actual value of the improvements plus the actual value of the land are not the same, in such event the jury may still consider the actual value of the land or interest therein appropriated. *Department of Transp. v. Brooks*, 153 Ga. App. 386, 265 S.E.2d 610 (1980).

Jury cannot consider value of property prior to time of taking. — Since the compensation to be paid for property condemned is to be determined by its value at the time of its actual taking, a jury cannot consider the value at a time prior to the actual time of taking. *West v. City of Atlanta*, 123 Ga. App. 255, 180 S.E.2d 277 (1971).

Nor can jury determine date of taking for compensation purposes. — The jury is not free to determine on the evidence that some date prior to the initiation of condemnation proceedings but after the announcement of the intent to condemn is the date of taking for the purposes of just and adequate compensation. *R.E. Adams Properties, Inc. v. City of Gainesville*, 125 Ga. App. 800, 189 S.E.2d 114 (1972).

Testimony of expert who examines property before and after taking. — When an expert witness testifies as to the value of property in a condemnation case, and the examination of the witness discloses that his examination of the property had been made both before and after the date of taking, this does not prevent his testimony from having probative value as to the date of taking where the witness testifies as to his

familiarity with the property as of the date of taking. His entire testimony cannot be excluded. *West v. City of Atlanta*, 123 Ga. App. 255, 180 S.E.2d 277 (1971).

Condemnor's testimony, standing alone, held inadmissible on question of consequential damages. — Where a limited access highway is condemned by the State, which highway cuts off several acres from the remainder of the land of the condemnee leaving those several acres without any access thereto, testimony offered by the condemnor that with access there would be no damage to the isolated land, standing alone, is inadmissible and without probative value on the question of consequential damages to those several acres without access. *State Hwy. Dep't v. Howard*, 124 Ga. App. 76, 183 S.E.2d 26 (1971).

RESEARCH REFERENCES

Am. Jur. 2d. — 26 Am. Jur. 2d, Eminent Domain, §§ 150-156. 27 Am. Jur. 2d, Eminent Domain, §§ 266-296, 310-320, 357-374, 427-442.

C.J.S. — 29A C.J.S., Eminent Domain, §§ 32-35, 110-185, 271-275.

ALR. — Right to interest in condemnation proceedings during owner's retention of possession, 32 ALR 98.

Measure of damages or compensation where property is taken to widen street, 64 ALR 1513.

Right of property owner to compensation for diversion of traffic by relocation or rerouting of highway, 118 ALR 921.

Deduction of benefits in determining compensation or damages in eminent domain, 145 ALR 7.

What physical construction amounts to a change of grade within statute relating to award of damages, 156 ALR 416.

Unity or contiguity of properties essential to allowance of damages in eminent domain proceedings on account of remaining property, 6 ALR2d 1197.

Compensation for, or extent of rights acquired by, taking of land, as affected by condemner's promissory statements as to character of use or undertakings to be performed by it, 7 ALR2d 364.

Elements and measure of compensation in eminent domain for temporary use and occupancy, 7 ALR2d 1297.

Fire risk or hazard as element of damages in condemnation proceedings, 63 ALR2d 313.

Cost to property owner of moving personal property as element of damages or compensation in eminent domain proceedings, 69 ALR2d 1453.

Interference with view as matter for consideration in eminent domain, 84 ALR2d 348.

Changes in purchasing power of money as affecting compensation in eminent domain proceedings, 92 ALR2d 772.

Eminent domain: restrictive covenant or right to enforcement thereof as compensable property right, 4 ALR3d 1137.

Propriety and effect, in eminent domain proceedings, of argument or evidence as to source of funds to pay for property, 19 ALR3d 694.

Eminent domain: admissibility, on issue of value of condemned real property, of rental value of other real property, 23 ALR3d 724.

Award of, or pending proceedings for, compensation for property condemned, as precluding action for damages arising from prior trespasses upon it, 33 ALR3d 1132.

Eminent domain: cost of substitute facilities as measure of compensation paid to state or municipality for condemnation of public property, 40 ALR3d 143.

Good will or "going concern" value as element of lessee's compensation for taking leasehold in eminent domain, 58 ALR3d 566.

Loss of liquor license as compensable in condemnation proceeding, 58 ALR3d 581.

Eminent domain: condemnor's liability for costs of condemnee's expert witnesses, 68 ALR3d 546.

Eminent domain: right of owner of land not originally taken or purchased as part of adjacent project to recover, on enlargement of project to include adjacent land, enhanced value of property by reason of proximity to original land — state cases, 95 ALR3d 752.

22-2-110. Award of special master — Time of filing; award to become part of record of proceedings; vesting of title in condemnor upon deposit of award into court; form of award; use of special master's findings and award in subsequent appeal.

(a) The award of the special master shall be filed with the clerk of the superior court of the county where the property or interest is situated within three days after the date of such hearing.

(b) The award shall become a part of the record of the proceedings in said matter and shall condemn and vest title to the property or other interest in the condemning body upon the deposit by that body of the amount of the award into the registry of the court, subject to the demand of such condemnee or condemnees, according to their respective interests.

(c) The award shall be in the following form:

AWARD OF SPECIAL MASTER

I, _____, the special master appointed and chosen by the court to hear evidence, give full consideration to all matters touching upon the value of the property or interest sought to be condemned, as shown by the description of the property or interest in the case of _____ (condemning body) versus _____ (acres of land or other described interest in said land) and _____ (condemnee), Civil action file no. _____ in superior court, and having first taken the oath as required by law of the special master, the same having been filed with the clerk of the Superior Court of _____ County, which is the county of my residence, and having heard evidence under oath and given consideration to the value of such property or interest on the _____ day of _____, at _____: _____.M., as provided for in the order of the court, do decide and recommend to the court as follows:

(1) I find and award to _____, condemnee, the sum of \$_____, as the actual market value of the property or interest sought to be condemned;

(2) I find consequential damages to the remaining property or interest in the amount of \$_____;

(3) I find consequential benefits to the remaining property or interest in the amount of \$_____ (never to exceed the amount of the consequential damages);

(4) Balancing the consequential benefits against the consequential damages, I find and award to the condemnee in this case in the total sum of \$_____, and I respectfully recommend to the court that the said property or interest be condemned by a judgment in rem to the use of the condemnor upon the payment of the last stated sum into the registry of the court, subject to the demands of the condemnee.

This _____ day of _____, 19 _____.

Special Master

(d) In any case where there is an appeal from the award of the special master to a jury in the superior court, the award of the special master shall not be competent evidence. Any such appeal shall be a de novo investigation, and the award of the special master shall be detached from the papers in the case before the same are delivered to the jury. (Ga. L. 1957, p. 387, § 12.)

JUDICIAL DECISIONS

Legislature has provided adequate method for determining compensation. — The Legislature, by enacting §§ 22-2-102, 22-2-108 and 22-2-112, has provided an adequate method for determining the just and adequate compensation of property sought to be condemned under this article and this section of the act in no wise limits the master to an arbitrary finding. *Kellett v. Fulton County*, 215 Ga. 551, 111 S.E.2d 364 (1959).

This section provides notice as a matter of law to all of the parties and their counsel that the award will be filed within the required time and that an attempt to appeal the matter to a jury in the superior court coming more than 10 days after its filing, as provided by § 22-2-112, comes too late. *Wilson v. City of Waycross*, 130

Ga. App. 253, 203 S.E.2d 301 (1973).
No property taken until payment of award. — No property is taken under the special master procedure until the payment of the award into the registry of the court is made. *Arnold v. State Hwy. Dep't*, 116 Ga. App. 201, 156 S.E.2d 469 (1967).
In a special master proceeding under § 22-2-107 and this section, the taking is complete upon the award of the special master and payment into court of the amount determined. *Roberts v. Wise*, 140 Ga. App. 1, 230 S.E.2d 320 (1976).
Payment of award not condition precedent to condemnor's appeal. — A condemnor is not required to pay the award of the special master into the registry of the court within ten days after the filing of the award, or at the time of, or prior to

the filing of the appeal as a condition precedent to its right of appeal. *Arnold v. State Hwy. Dep't*, 116 Ga. App. 201, 156 S.E.2d 469 (1967).

Testimony of special master. — While there is nothing in the statute barring a special master from testifying, obviously the admission of his testimony must be governed by the applicable rules of evidence. *Garner v. Gwinnett County*, 105 Ga. App. 714, 125 S.E.2d 563 (1962).

Denial of motion to dismiss held not appealable. — A denial of a motion to dismiss condemnation proceedings on the

ground that their initiation was beyond the power of the condemning authority may not be appealed where the case is still pending and no certificate of immediate review was obtained from the trial judge. *Norton Realty & Loan Co. v. Board of Educ.*, 123 Ga. App. 620, 182 S.E.2d 185 (1971).

Cited in *Georgia Power Co. v. Bray*, 232 Ga. 558, 207 S.E.2d 442 (1974); *City of Savannah Beach v. Thompson*, 135 Ga. App. 63, 217 S.E.2d 304 (1975); *Sweat v. Georgia Power Co.*, 235 Ga. 281, 219 S.E.2d 384 (1975).

RESEARCH REFERENCES

Am. Jur. 2d. — 26 Am. Jur. 2d, Eminent Domain, §§ 130-132. 27 Am. Jur. 2d, Eminent Domain, § 470.

C.J.S. — 29A C.J.S., Eminent Domain, §§ 191, 192, 195-205. 30 C.J.S., Eminent Domain, §§ 299-304, 327-329, 360-372, 449-452.

ALR. — Right of court to reduce or increase award in condemnation and confirm it as reduced or increased, 61 ALR 194.

22-2-111. Same — Incorporation of award into judgment of court.

Upon the entry of the award of the special master and the presentation of the award to the judge of the superior court, the judge shall enter a proper order and judgment of the court condemning the described property or other interest in rem to the use of the condemnor upon the condemnor's paying into the registry of the court the amount provided in the award of the special master. (Ga. L. 1957, p. 387, § 13.)

JUDICIAL DECISIONS

This section does not violate state constitutional prerequisite that just and adequate compensation shall first be paid before private property is taken for public use, since the method of determining what is just and adequate compensation is a matter of legislative discretion, and the method prescribed herein fully and adequately protects that constitutional right. *Anthony v. State Hwy. Dep't*, 215 Ga. 853, 113 S.E.2d 768 (1960).

Time of taking is spelled out in this section. *Johnson v. Fulton County*, 103 Ga. App. 873, 121 S.E.2d 54 (1961).

No property taken until payment of award. — No property is taken under the special master procedure until the payment of the award into the registry of the court is made. *Arnold v. State Hwy. Dep't*, 116 Ga. App. 201, 156 S.E.2d 469 (1967).

No blanket authority to always condemn fee simple interest. — The fact that a city has authority to condemn in fee simple pursuant to a statutory procedure does not carry with it blanket authority always to condemn a fee simple interest; the condemnor can take no more property than is reasonably necessary for the public

purpose for which the property is being condemned. *Heirs of Champion v. City of Atlanta*, 149 Ga. App. 470, 254 S.E.2d 706 (1979).

Payment of award not condition precedent to condemnor's appeal. — A condemnor is not required to pay the award of the special master into the registry of the court within ten days after the filing of the award, or at the time of, or prior to the filing of the appeal as a condition precedent to its right of appeal. *Arnold v. State Hwy. Dep't*, 116 Ga. App. 201, 156 S.E.2d 469 (1967).

Exceptions to special master's rulings on nonvalue issues must be made prior to judgment authorized by this section. *Sweat*

v. Georgia Power Co., 235 Ga. 281, 219 S.E.2d 384 (1975).

Amendments not allowed after entry of judgment. — Once a condemnation judgment has been entered vesting title in the condemnor, amendments increasing or decreasing the amount or quantum of property taken cannot be allowed. *Zuber Lumber Co. v. City of Atlanta*, 237 Ga. 358, 227 S.E.2d 362 (1976).

Cited in *Wiggins v. City of Macon*, 120 Ga. App. 197, 169 S.E.2d 667 (1969); *Taylor v. Taylor County*, 231 Ga. 209, 200 S.E.2d 887 (1973); *City of Savannah Beach v. Thompson*, 135 Ga. App. 63, 217 S.E.2d 304 (1975).

22-2-112. Same — Appeal of award generally.

In case any party is dissatisfied with the amount of the award, he may, within ten days after the award is filed, enter in writing an appeal from the award to the superior court of the county where the award is filed. At the term succeeding the filing of the appeal, it shall be the duty of the judge to cause an issue to be made and tried by a jury as to the value of the property or interest taken or the amount of damage done, with the same right to move for a new trial and file an appeal as in other cases at law. The entering of an appeal and the proceedings thereon shall not hinder or delay in any way the condemnor's work or the progress thereof. (Ga. L. 1957, p. 387, § 14.)

JUDICIAL DECISIONS

This section provides for appeal from award of master to superior court where the issue as to the value of the property shall be tried by a jury. *Johnson v. Fulton County*, 103 Ga. App. 873, 121 S.E.2d 54 (1961).

Appeal in superior court only method of correcting special master's errors. — The only method of correcting any errors the assessors or a special master may have made in the original hearing and award is not by recommitment to that body but by an appeal in the superior court, which begins again the process of adjudication. *City of Savannah Beach v. Thompson*, 135 Ga. App. 63, 217 S.E.2d 304 (1975).

If an appeal is taken by any party to a jury pursuant to this section, the trial judge

commits error in remanding the case to the special master. The trial judge should rule on all legal issues, either by pretrial order or during the course of the trial, in the jury case pending before him. *Zuber Lumber Co. v. City of Atlanta*, 237 Ga. 358, 227 S.E.2d 362 (1976).

This section is copied from § 22-2-80 and consequently has the same meaning. *Johnson v. Fulton County*, 103 Ga. App. 873, 121 S.E.2d 54 (1961).

This section and § 22-2-80 must be given the same meaning. Both provide that appeals must be in writing and filed in the superior court of the county where the award is filed and within ten days thereof. *City of Savannah Beach v. Thompson*, 135 Ga. App. 63, 217 S.E.2d 304 (1975).

Award becomes final if appeal not filed within ten days. — If an appeal to a jury is desired it must be filed within ten days after the filing of the award or it becomes final. *Hardy v. Georgia Power Co.*, 151 Ga. App. 805, 261 S.E.2d 748 (1979).

Section 5-3-20 does not extend time for filing notice of appeal specified in this section. *City of Savannah Beach v. Thompson*, 135 Ga. App. 63, 217 S.E.2d 304 (1975).

Appeal to superior court is de novo proceeding. — If an appeal is taken pursuant to this section to a jury in the superior court, the trial in the superior court is a de novo proceeding, and it is the duty of the trial judge, by pretrial order or during the course of the trial, to rule on all legal issues. *Zuber Lumber Co. v. City of Atlanta*, 237 Ga. 358, 227 S.E.2d 362 (1976).

Sole question on appeal is amount of compensation. — The sole question to be passed upon by the assessors, or a jury in the superior court on appeal, is the amount of compensation to be paid. Whether the quantity of land sought to be taken is necessary and proper for the purpose for which it is sought is a question not involved in such a proceeding. *Johnson v. Fulton County*, 103 Ga. App. 873, 121 S.E.2d 54 (1961).

When an appeal is taken from a special master's award to a jury in the superior court pursuant to this section, the only issue for decision by the jury is the value of the subject property taken. *Taylor v. Taylor County*, 231 Ga. 209, 200 S.E.2d 887 (1973).

Exceptions to special master's rulings on issues of law. — If an appeal to a jury in the superior court is not taken by one of the parties pursuant to this section, then exceptions to the rulings on issues of law made by the special master must be timely filed and presented to the trial judge for decision. *Zuber Lumber Co. v. City of Atlanta*, 237 Ga. 358, 227 S.E.2d 362 (1976).

One who does not except to the findings of the special master or appeal from the judgment of condemnation cannot, on the usual appeal to a jury on the question of value, raise legal issues by way of counterclaim or motion. *Roberts v. Wise*, 140 Ga. App. 1, 230 S.E.2d 320 (1976).

Right to jury trial on appeal does not extend to nonvalue issues. — The right of the condemnees to appeal the award of the special master to a jury trial does not carry with it the right to have a jury trial on the other issues in the case. *Leach v. Georgia Power Co.*, 228 Ga. 16, 183 S.E.2d 755 (1971).

Finality of special master's judgment during pendency of appeal. — Where an appeal to a jury as to value is pending, the judgment of condemnation under the special master's condemnation procedure is not a final judgment subject to review in the absence of a certificate as provided for by § 5-6-34. *City of Atlanta v. Turner Adv. Co.*, 234 Ga. 1, 214 S.E.2d 501 (1975).

Where property is condemned and the judgment provides that no compensation is to be paid by the condemnor, there is no question to be presented to a jury as to value, and such judgment is final and subject to review without a certificate. *City of Atlanta v. Turner Adv. Co.*, 234 Ga. 1, 214 S.E.2d 501 (1975).

Market value is generally measure of damages. — The general rule is that the measure of damages, excluding the question of consequential damages and benefits, is the market value of the property taken. *State Hwy. Dep't v. Stewart*, 104 Ga. App. 178, 121 S.E.2d 278 (1961).

But just and adequate compensation does not necessarily restrict recovery to market value where, by reason of special factors, the pecuniary value of the property to the owner is for some reason not the same as the actual cash market value. *State Hwy. Dep't v. Stewart*, 104 Ga. App. 178, 121 S.E.2d 278 (1961).

Market value defined. — The market value of property is what a person who does not have to sell is willing to take from a person who is willing to buy but does not have to buy. *State Hwy. Dep't v. Stewart*, 104 Ga. App. 178, 121 S.E.2d 278 (1961).

Consideration of market value of land for any purpose. — In determining the value of the land the jury must consider the market value of the property for any purpose for which it is suitable or it is adapted. *State Hwy. Dep't v. Stewart*, 104 Ga. App. 178, 121 S.E.2d 278 (1961).

Consequential damages resulting from rentals lost before actual taking. — After a

judgment that a taking is complete, a condemnee may appeal to a jury under this section as to the consequential damages resulting from lost rentals during the period between the announcement of the intent to condemn and date for actual taking. Such an appeal is de novo as to the value of property taken or amount of damage done. *R.E. Adams Properties, Inc. v. City of Gainesville*, 125 Ga. App. 800, 189 S.E.2d 114 (1972).

Appeal governed by rules applicable to ordinary suits. — The trial of an appeal from the award of the special master in the superior court, which is a de novo investigation, is a judicial proceeding governed by the rules applicable to ordinary suits in the jurisdiction. *City of Gainesville v. Loggins*, 116 Ga. App. 548, 158 S.E.2d 287 (1967), rev'd on other grounds, 224 Ga. 114, 160 S.E.2d 374 (1968).

Dismissal of appeal filed more than ten days after award. — Where, in a condemnation action, an appeal to a jury in superior court is filed more than ten days after the filing of the award of a special master, it is error for a trial court not to dismiss the appeal. *Howell Enterprises, Inc. v. City of Atlanta*, 123 Ga. App. 767, 182 S.E.2d 331 (1971).

An appeal not filed within the prescribed ten-day period is not timely and the proper judgment is one of dismissal. *City of Savannah Beach v. Thompson*, 135 Ga. App. 63, 217 S.E.2d 304 (1975).

Payment of special master's award as condition precedent to appeal. — A condemnor is not required to pay the award of the special master into the registry of the court within ten days after the filing of the award, or at the time of, or prior to the filing of the appeal as a condition precedent to its right of appeal. *Arnold v. State Hwy. Dep't*, 116 Ga. App. 201, 156 S.E.2d 469 (1967).

Payment of amount of verdict as condition precedent to appeal. — Under the constitutional mandate that private property cannot be taken or damaged for public use without first paying just and adequate compensation to the owner, the payment of the amount of a jury verdict in excess of the prior appraisal by assessors, or special master, is a condition precedent to a valid appeal from such verdict and the judgment

based thereon. *City of Gainesville v. Loggins*, 224 Ga. 114, 160 S.E.2d 374 (1968).

The payment of the amount of the jury verdict in excess of the prior appraisal by assessors, or special master, is a condition precedent to the condemnor seeking a second de novo jury trial. *Paulk v. Georgia Power Co.*, 231 Ga. 721, 204 S.E.2d 154, later appeal, 131 Ga. App. 218, 205 S.E.2d 484 (1974).

Tender of award to condemnee not condition precedent to condemnor's appeal. — Where a proceeding in rem is brought to condemn property for a public use under the provisions of this article, tender of the amount awarded by the special master to the apparent or ostensible owner of such property is not a condition precedent to the condemnor's right to pay the award into the registry of the court and enter an appeal to a jury. *Hunt v. State Hwy. Dep't*, 101 Ga. App. 797, 115 S.E.2d 384 (1960); *Tillman v. State Hwy. Dep't*, 101 Ga. App. 865, 115 S.E.2d 459 (1960); *Slocumb v. Housing Auth.*, 101 Ga. App. 765, 115 S.E.2d 459 (1960); *State Hwy. Dep't v. Taylor*, 102 Ga. App. 15, 115 S.E.2d 703 (1960); *State Hwy. Dep't v. Farmers Gin Co.*, 102 Ga. App. 35, 115 S.E.2d 760 (1960).

Entry of judgment where appeal results in lower award. — Where a special master makes an award to a condemnee, who subsequently is granted a jury trial on appeal which results in a lower award, the judgment should be entered even though the condemnor never appealed the award of the special master because an appeal by either party entitles both parties to a de novo determination of the issue. *Smith v. Georgia Power Co.*, 131 Ga. App. 380, 205 S.E.2d 916 (1974).

Refusal by clerk of superior court to pay over amount awarded to condemnee which had been paid to such clerk by the condemnor in connection with its appeal for a jury trial is not a proper ground for dismissal of such appeal because where the condemnor pays the amount of the award of the assessors into the registry of the court, the condemnor is not thereafter concerned with its distribution, and, further, such condemnor is not responsible for the clerk's actions. *State Hwy. Dep't v.*

Taylor, 102 Ga. App. 15, 115 S.E.2d 703 (1960).

Payment of award by delivery of check.

— The delivery of a check, in the amount of condemnation award, to the clerk of the superior court is not payment of such amount into the registry of the court where sufficient funds to cover such check are not on deposit at the bank on which such check is drawn during the ten day period when an appeal may be filed. *State Hwy. Dep't v. Farmers Gin Co.*, 102 Ga. App. 35, 115 S.E.2d 760 (1960).

Where jury is unable to agree on whether condemnee is entitled to recover expenses of litigation, including attorney fees, the trial court is not authorized to grant the condemnee's motion for judgment notwithstanding the mistrial.

Department of Transp. v. Glenn, 243 Ga. 21, 252 S.E.2d 906 (1979).

Cited in *Georgia S. & F. Ry. v. City of Warner Robins*, 107 Ga. App. 370, 130 S.E.2d 151 (1963); *Housing Auth. v. Baker*, 119 Ga. App. 109, 166 S.E.2d 437 (1969); *Wiggins v. City of Macon*, 120 Ga. App. 197, 169 S.E.2d 667 (1969); *Wilson v. City of Waycross*, 130 Ga. App. 253, 203 S.E.2d 301 (1973); *Sweat v. Georgia Power Co.*, 235 Ga. 281, 219 S.E.2d 384 (1975); *Glynn County v. Victor*, 143 Ga. App. 198, 237 S.E.2d 701 (1977); *Shoemaker v. Department of Transp.*, 240 Ga. 573, 241 S.E.2d 820 (1978); *DeKalb County v. Trustees, Decatur Lodge No. 1602, B.P.O. Elks*, 145 Ga. App. 180, 243 S.E.2d 284 (1978).

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Appeal and Error, §§ 146, 188. 27 Am. Jur. 2d, Eminent Domain, §§ 448, 468-472.

C.J.S. — 30 C.J.S., Eminent Domain, §§ 281-291, 343-345.

ALR. — Right to intervene in court review of zoning proceeding, 46 ALR2d 1059.

Right of adjoining landowners to intervene in condemnation proceedings on ground that they might suffer consequential damage, 61 ALR2d 1292.

Liability, upon abandonment of eminent domain proceedings, for loss or expenses incurred by property owner, or for interest on award or judgment, 92 ALR2d 355.

22-2-113. Same — Effect of tender, payment, or acceptance of award on right of appeal; right of owners of separate and distinct parcels to file separate appeal; effect of discrepancy between award of special master and verdict of jury; issuance of execution upon award or judgment.

(a) The tender, payment, or acceptance of the amount of the award shall not prevent any party from prosecuting the appeal.

(b) Where separate and distinct parcels of property are condemned in the same proceeding, the owner of any separate and distinct property may file a separate appeal to a jury in the superior court.

(c) If the amount awarded by the special master is less than that found by the verdict of the jury, the condemnor shall be bound to pay the sum so finally adjudged less the amount previously deposited as provided in Code Section 22-2-110 plus lawful interest on the difference from the date of the order of the special master, in order to retain the property.

(d) If the condemnor fails to pay the amount of the award or judgment within ten days after the same is filed or entered, then the clerk shall issue

execution upon such award or judgment which may be levied upon any property of the condemnor. (Ga. L. 1957, p. 387, § 15.)

JUDICIAL DECISIONS

Judgment authorized by this section is clearly in personam judgment. *Atlanta Whses., Inc. v. Housing Auth.*, 143 Ga. App. 588, 239 S.E.2d 387 (1977).

Condemnor cannot insist upon its right to take property and refuse to pay the amount awarded to the condemnee at the same time. *State Hwy. Dep't v. Taylor*, 102 Ga. App. 15, 115 S.E.2d 703 (1960).

One cannot voluntarily accept money awarded for his property and still contest right to condemn, but such acceptance in no way precludes one from protesting the value amount of the award. *Tingle v. Georgia Power Co.*, 150 Ga. App. 867, 258 S.E.2d 668 (1979).

Award becomes final if appeal not filed within ten days. — If an appeal to a jury is desired it must be filed within ten days after the filing of the award or it becomes final. *Hardy v. Georgia Power Co.*, 151 Ga. App. 805, 261 S.E.2d 748 (1979).

"Owner" intended to be distinguished from other condemnees. — It is obvious that the Legislature in using the word "owner" not only intended it to have its ordinary signification, but in doing so, also distinguished the owner from other condemnees. *Citizens & S. Nat'l Bank v. Fulton County*, 123 Ga. App. 323, 180 S.E.2d 905 (1971).

Leaseholder is "owner" within the meaning of this section. *Allen v. Hall County*, 156 Ga. App. 629, 275 S.E.2d 713 (1980).

Bank as lienholder is not "owner" within the meaning of the statute as to the money received by it under the order of the court and the agreement of the parties. *Citizens & S. Nat'l Bank v. Fulton County*, 123 Ga. App. 323, 180 S.E.2d 905 (1971).

Judgment in condemnation action may be pleaded in bar of subsequent damage suit. *R.E. Adams Properties, Inc. v. City of Gainesville*, 125 Ga. App. 800, 189 S.E.2d 114 (1972).

Computation of interest. — Where interest is computed on an amount which

the condemnee must refund to the condemnor, interest is computed only from the date of the adjudication of principal amount. *State Hwy. Dep't v. Rogers*, 118 Ga. App. 626, 165 S.E.2d 172 (1968).

Payment of amount of verdict as condition precedent to appeal. — The payment of the amount of the jury verdict in excess of the prior appraisal by assessors, or special master, is a condition precedent to the condemnor seeking a second de novo jury trial. *Georgia Power Co. v. Paulk*, 131 Ga. App. 218, 205 S.E.2d 484 (1974).

Tender of award to condemnee not condition precedent to condemnor's appeal. — Where a proceeding in rem is brought to condemn property for a public use under the provisions of this article, tender of the amount awarded by the special master to the apparent or ostensible owner of such property is not a condition precedent to the condemnor's right to pay the award into the registry of the court and enter an appeal to a jury. *Hunt v. State Hwy. Dep't*, 101 Ga. App. 797, 115 S.E.2d 384 (1960); *Tillman v. State Hwy. Dep't*, 101 Ga. App. 865, 115 S.E.2d 459 (1960); *Slocumb v. Housing Auth.*, 101 Ga. App. 765, 115 S.E.2d 459 (1960); *State Hwy. Dep't v. Taylor*, 102 Ga. App. 15, 115 S.E.2d 703 (1960); *State Hwy. Dep't v. Farmers Gin Co.*, 102 Ga. App. 35, 115 S.E.2d 760 (1960).

Refusal by clerk of superior court to pay over amount awarded to condemnee, which had been paid to such clerk by the condemnor in connection with its appeal for a jury trial is not a proper ground for dismissal of such appeal because where the condemnor pays the amount of the award of the assessors into the registry of the court, the condemnor is not thereafter concerned with its distribution, and, further, such condemnor is not responsible for the clerk's actions. *State Hwy. Dep't v. Taylor*, 102 Ga. App. 15, 115 S.E.2d 703 (1960).

Payment of award by delivery of check.

— The delivery of a check, in the amount of condemnation award, to the clerk of the superior court is not payment of such amount into the registry of the court where sufficient funds to cover such check are not on deposit at the bank on which such check is drawn during the ten day period when an appeal may be filed. *State Hwy. Dep't v.*

Farmers Gin Co., 102 Ga. App. 35, 115 S.E.2d 760 (1960).

Cited in *City of Atlanta v. Lunsford*, 105 Ga. App. 247, 124 S.E.2d 493 (1962); *Golfland, Inc. v. Thomas*, 107 Ga. App. 563, 130 S.E.2d 757 (1963); *City of Savannah Beach v. Thompson*, 135 Ga. App. 63, 217 S.E.2d 304 (1975).

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Appeal and Error, § 258.

C.J.S. — 29A C.J.S., Eminent Domain, § 194. 30 C.J.S., Eminent Domain, § 332.

ALR. — Right under constitutional provision against taking or damaging, to recover in other than an eminent domain proceeding, for consequential damages to property no part of which is taken, 20 ALR 516.

Right to interest in condemnation proceedings during owner's retention of possession, 32 ALR 98.

Condemnor's right, as against condemnee, to interest on excessive money deposited in court or paid to condemnee, 99 ALR2d 886.

22-2-114. Effect of deposit of award into court registry; conflicting claims as to deposit.

When the condemnor has paid into the registry of the court the amount provided for in the award of the special master, for the use and benefit of and subject to the demands of the condemnees, the effect of such payment into the registry of the court shall be the same as if paid to the condemnees directly, provided that the clerk shall pay out the money to the condemnees or their personal representatives upon proper proof submitted to him as to the quantity of their interests. Where there are conflicting claims, the clerk may require the conflicting parties to establish their claims before the court as is provided by law in other similar matters. (Ga. L. 1957, p. 387, § 16.)

JUDICIAL DECISIONS

This section requires payment into registry of court so that proper distribution can be made to all claimants of the fund. *City of Gainesville v. Loggins*, 224 Ga. 114, 160 S.E.2d 374 (1968).

Court, not jury on appeal, will decide quantity of interest of each condemnee. *Johnson v. Fulton County*, 103 Ga. App. 873, 121 S.E.2d 54 (1961).

Burden is on one claiming entitlement to part of proceeds to make his claim before the clerk. *Roberts v. Wise*, 140 Ga. App. 1, 230 S.E.2d 320 (1976).

When one party holds condemnation proceeds in trust until conflicting claims can be resolved, this section may be applied in resolving those claims even though none of the condemnation fund is held in the

registry of any court. *Fourth Nat'l Bank v. Grant*, 140 Ga. App. 78, 230 S.E.2d 60 (1976).

It is not error to fail to submit to jury question of apportionment of condemnation proceeds under this section. *Fourth Nat'l Bank v. Grant*, 140 Ga. App. 78, 230 S.E.2d 60 (1976).

Consent order to pay funds directly to bank as lienholder is nothing more than an agreement among those asserting rights in the property as to the priority of the bank. *Citizens & S. Nat'l Bank v. Fulton County*, 123 Ga. App. 323, 180 S.E.2d 905 (1971).

Opening case after judgment based on

claim to portion of proceeds. — One who fails to file a proper claim or make a timely protest to the judgment may not, after many terms of court have intervened, open up the case on the sole ground that he is entitled to a portion of the proceeds. *Roberts v. Wise*, 140 Ga. App. 1, 230 S.E.2d 320 (1976).

Cited in *Golfland, Inc. v. Thomas*, 107 Ga. App. 563, 130 S.E.2d 757 (1963); *Zuber Lumber Co. v. City of Atlanta*, 237 Ga. 358, 227 S.E.2d 362 (1976); *Glynn County v. Victor*, 143 Ga. App. 198, 237 S.E.2d 701 (1977).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Eminent Domain, § 452.

C.J.S. — 29A C.J.S., Eminent Domain, § 205. 30 C.J.S., Eminent Domain, § 330.

ARTICLE 3

PROCEEDING BEFORE COURT

JUDICIAL DECISIONS

The purpose of this special condemnation statute is to afford a speedy and fair means whereby the public authorities may acquire a clear title to the lands sought for public purposes, and the landowner and all parties concerned may receive their just compensation therefor. *Denham v. State Hwy. Bd.*, 52 Ga. App. 790, 184 S.E. 631 (1936).

The purpose and the mandatory requirement of this article is for the condemnor to pay the amount of the award into the registry of the court so that it may be disbursed after a judgment has been taken against the property described in the petition and to those responding parties whom the judge, after hearing their respective claims thereto, finds to be justly entitled. *Kreutz v. Housing Auth.*, 107 Ga. App. 315, 130 S.E.2d 134 (1963).

In proceeding under this article, speedy action and progress is to be obtained so far as possible, and the statutes providing therefor must be strictly pursued. *Denham v. State Hwy. Bd.*, 52 Ga. App. 790, 184 S.E. 631 (1936).

Fact that State of Georgia is condemnor does not deprive condemnee of equal protection of law since he is authorized to make any valid defense in the condemnation proceeding itself. *Russell v. Venable*, 216 Ga. 137, 115 S.E.2d 103 (1960).

This article is general law, and may be amended by another general law in accord with the state Constitution. *Russell v. Venable*, 216 Ga. 137, 115 S.E.2d 103 (1960).

This article makes adequate provision for anyone claiming interest to assert equitable as well as legal rights to the property in the condemnation proceeding itself. *Mitchell v. State Hwy. Dep't*, 216 Ga. 517, 118 S.E.2d 88 (1961).

All legal and equitable issues relevant to the condemnation of a piece of land may be raised in a single proceeding under this article, unless principles of waiver or estoppel apply. *DeKalb County v. Jackson-Atlantic Co.*, 123 Ga. App. 695, 182 S.E.2d 160 (1971).

All matters in opposition to petition to condemn property must be filed in condemnation proceeding, when the petition

is filed under the provisions of this article. *Howard v. Housing Auth.*, 220 Ga. 640, 140 S.E.2d 880 (1965).

Prior to enactment of this article, there were no pleadings in condemnation proceeding, and no hearings provided for before the presiding judge prior to appeal; questions pertaining to the right to condemn, the constitutionality of the proceedings, and similar questions, could be made by the condemnee only in a separate bill in equity. *Martin v. Fulton County*, 213 Ga. 761, 101 S.E.2d 716 (1958).

Constitutionality of statute may be questioned in separate equity proceeding. — Where the condemnee contends that the proceedings were brought under an unconstitutional statute, the validity of the statute may be called in question under a separate proceeding in equity. *Martin v. Fulton County*, 213 Ga. 761, 101 S.E.2d 716 (1958).

Injunction available where remedy at law not adequate. — In condemnation proceedings under this article, a bill for injunction will lie where the remedy at law is not adequate and complete. *Martin v. Fulton County*, 213 Ga. 761, 101 S.E.2d 716 (1958).

Equitable defenses and pleadings may be filed in condemnation proceedings. — While it has been held that a separate petition in equity for injunction may, in certain instances, be brought to restrain a condemnation proceeding filed under this chapter, it does not necessarily follow that equitable defenses and equitable pleadings may not be filed in such a condemnation proceeding, as in other actions at law. *Martin v. Fulton County*, 213 Ga. 761, 101 S.E.2d 716 (1958).

Use and review of motions to dismiss. — Section 22-2-132 specifically provides the nature and character of the objections which may be urged before the presiding judge, which include “any other matters material to their respective rights”; matters pertaining to the rights of the condemnee might therefore be raised by general and special demurrers (now motions to dismiss) as in other cases, and an adverse ruling on a general demurrer (now motion to dismiss) can be reviewed by a direct bill of exceptions prior to any final judgment in the condemnation case. *Martin v. Fulton*

County, 213 Ga. 761, 101 S.E.2d 716 (1958).

This article does not provide for any method of review of interlocutory orders, and the only final judgment in this proceeding is the judgment of award. *Stewart v. Board of Comm’rs*, 66 Ga. App. 108, 17 S.E.2d 203 (1941).

Condemnee cannot halt proceedings under this article at any stage before appointment of assessors and award by interposing a demurrer to the petition filed by the condemnor. *Denham v. State Hwy. Bd.*, 52 Ga. App. 790, 184 S.E. 631 (1936).

Section 5-3-8 applicable to appeals in condemnation proceedings. — The provisions of § 5-3-8, requiring the consent of the opposite party before an appeal may be dismissed, are applicable to appeals in condemnation proceedings instituted under this article. *State Hwy. Dep’t v. Blalock*, 98 Ga. App. 630, 106 S.E.2d 552 (1958).

Issue of whether condemnee intends to dedicate land to public use is an issue that the trial judge should rule on in a pretrial order. *DeKalb County v. Jackson-Atlantic Co.*, 123 Ga. App. 695, 182 S.E.2d 160 (1971).

Whether a condemnee dedicated a large portion of the land to public use is a mixed question of law and fact concerning the nature and amount of the land in issue, and its determination is for the trial judge. *DeKalb County v. Jackson-Atlantic Co.*, 123 Ga. App. 695, 182 S.E.2d 160 (1971).

Where there is no express dedication for public use and the requisite intent must be implied, the acts relied upon to establish such dedication must be such as clearly showed a purpose on the part of the owner to abandon his own personal dominion over such property, and to devote the same to a definite public use. *DeKalb County v. Jackson-Atlantic Co.*, 123 Ga. App. 695, 182 S.E.2d 160 (1971).

Where condemnor pays award of assessors into registry of court as provided by this article, the condemnor is not thereafter concerned with its distribution. *Kreutz v. Housing Auth.*, 107 Ga. App. 315, 130 S.E.2d 134 (1963).

Tender of award to owner not condition precedent to condemnor’s appeal. — Where a proceeding in rem is brought to condemn property for a public use under

the provisions of this article, tender of the amount awarded by the assessors to the apparent or ostensible owner of such property is not a condition precedent to the condemnor's right to pay the award into the registry of the court and enter an appeal to a jury. *State Hwy. Dep't v. Farmers Gin Co.*, 216 Ga. 70, 114 S.E.2d 537, answer conformed to, 102 Ga. App. 35, 115 S.E.2d 760 (1960).

Question of value is sole issue for jury on appeal. — While all issues may be raised in an appeal from the assessors' award, the question of value is the sole issue to be submitted to the jury, and its fact-finding powers are limited to those facts directly touching on value. *DeKalb County v. Jackson-Atlantic Co.*, 123 Ga. App. 695,

182 S.E.2d 160 (1971).

Motion to dismiss appeal in condemnation proceedings under this article, which is regulated by Part 5, Art. I of this chapter, falls in a different category from an oral motion to strike pleadings, amendments, or answers, since the motion to dismiss the appeal raises issues of fact. *Murray v. State Hwy. Dep't*, 103 Ga. App. 517, 120 S.E.2d 48 (1961).

Ruling on oral motion to strike motion to dismiss. — Trial court, in passing upon an oral motion to strike and dismiss the motion to dismiss an appeal in condemnation proceedings, can consider the evidence. *Murray v. State Hwy. Dep't*, 103 Ga. App. 517, 120 S.E.2d 48 (1961).

OPINIONS OF THE ATTORNEY GENERAL

Date of taking is date of special master's or assessor's award. 1970 Op. Att'y Gen. No. 70-116.

State Highway Department (now Department of Transportation) has authority to condemn private property to construct sidewalks, curbs and gutters,

and the department has authority to condemn private property for any and all necessary drainage ditches in connection with the construction and maintenance of any road or highway on the State Highway System. 1950-51 Op. Att'y Gen. p. 432.

RESEARCH REFERENCES

ALR. — Limitation applicable to action or proceeding by owner for compensation where property is taken in exercise of eminent domain without antecedent condemnation proceeding, 123 ALR 676.

Condemnation of premises or part thereof as affecting rights of landlord and tenant inter se, 163 ALR 679.

Condemnor's waiver, surrender, or limitation, after award, of rights or part of property acquired by condemnation, 5 ALR2d 724.

Right to open and close argument in trial of condemnation proceedings, 73 ALR2d 618.

Power of eminent domain as between state and subdivision or agency thereof, or as between different subdivisions or agencies themselves, 35 ALR3d 1293.

Condemned property's location in relation to proposed site of building complex or similar improvement as factor in fixing compensation, 51 ALR3d 1050.

22-2-130. Authority to petition superior court for judgment in rem.

Whenever the government of the State of Georgia, the United States government, or any person having the privilege of exercising the right of eminent domain desires to take or damage private property in pursuance of any law so authorizing and finds or believes that the title of the apparent or presumptive owner of such property is defective, doubtful,

incomplete, or in controversy or that there are or may be unknown persons or nonresidents who have or may have some claim or demand thereon or some actual or contingent interest or estate therein or that there are minors or persons under disability who are or may be interested therein or that there are taxes due or that should be paid thereon or concludes for any reason that it is desirable to have a judicial ascertainment of any question connected with the matter, such government or person may, through any authorized representative, petition the superior court of the county having jurisdiction for a judgment in rem against the property or interest, condemning the same to the use of the petitioner upon payment of just and adequate compensation therefor to the person or persons entitled to such payment. (Ga. L. 1914, p. 92, § 1; Code 1933, § 36-1104; Ga. L. 1937-38, Ex. Sess., p. 251, § 1.)

JUDICIAL DECISIONS

Statute to be strictly construed. — In a statutory proceeding, where a person may be deprived of property, the statute must be strictly construed. *Marist Soc'y v. City of Atlanta*, 212 Ga. 115, 90 S.E.2d 564 (1955).

This article authorizes condemnation of lands in fee simple. *Marist Soc'y v. City of Atlanta*, 212 Ga. 115, 90 S.E.2d 564 (1955).

Effect of 1937-1938 amendment. — The 1937-1938 amendment to this section permits counties to condemn land by petition under the provisions of this article. *Hoch v. Candler*, 190 Ga. 390, 9 S.E.2d 623 (1940).

Under the 1937-1938 amendment to this section, it is not necessary that the condemnation petition allege an unsuccessful effort to procure the land by contract or a failure to agree as to compensation. *Hoch v. Candler*, 190 Ga. 390, 9 S.E.2d 622 (1940).

Prior negotiations to procure land from owner by contract are not necessary in a proceeding brought under this section. *St. Clair v. State Hwy. Bd.*, 45 Ga. App. 488, 165 S.E. 297 (1932).

Venue of in rem proceeding is in county in which land lies; but if the tract of land lies in two counties, such proceeding can be brought in the superior court of either county. *Cook v. State Hwy. Bd.*, 162 Ga. 84, 132 S.E. 902 (1926).

Persons claiming interest must establish amount and character of interest. — It is the duty of persons claiming an interest

in property sought to be condemned to establish the amount and character of the interest claimed, and in such a proceeding all interests may be condemned, whether acquired by easement or by fee simple title to the property. *Marist Soc'y v. City of Atlanta*, 212 Ga. 115, 90 S.E.2d 564 (1955).

Court may enjoin condemnor from taking possession of and entering upon land until the issues made by the petition and defensive pleadings have been determined. *Mitchell v. State Hwy. Dep't*, 216 Ga. 517, 118 S.E.2d 88 (1961).

Condemnor cannot just abandon condemnation proceeding. *Marist Soc'y v. City of Atlanta*, 212 Ga. 115, 90 S.E.2d 564 (1955).

Tender or payment of award is necessary before property may be taken or the work thereon commenced. *Wilson v. State Hwy. Dep't*, 85 Ga. App. 907, 70 S.E.2d 535 (1952).

Where no motion for new trial is made and no exception taken to verdict and judgment following an appeal by the condemnor to the superior court, the land is condemned to public servitude subject only to payment of the amount of compensation fixed by the verdict and judgment. *Harrison v. State Hwy. Dep't*, 183 Ga. 290, 188 S.E. 445 (1936).

To vacate and set aside judgment for value of property condemned, affirmative action seeking to set aside judgment in favor of condemnor, and payment of all

expenses and damages accrued to the condemnee, are essential. *Marist Soc'y v. City of Atlanta*, 212 Ga. 115, 90 S.E.2d 564 (1955).

County authorities may by petition condemn land for road which is about to become a part of the State Highway System. *Hoch v. Candler*, 190 Ga. 390, 9 S.E.2d 622 (1940).

Condemnation of right of way across two tracts in one proceeding. — Under this section, the State can, in one proceeding, condemn a right of way over two tracts of land, one owned by one of the plaintiffs and the other owned by both plaintiffs, the proceeding being one in rem and not against the individuals. In such a proceeding, all persons interested will be allotted the damages to which they are respectively entitled. *Cook v. State Hwy. Bd.*, 162 Ga. 84, 132 S.E. 902 (1926).

The condemnor can, in one proceeding, condemn a right-of-way over several tracts of land owned by different persons. *Marist Soc'y v. City of Atlanta*, 212 Ga. 115, 90 S.E.2d 564 (1955).

Insufficient description of condemned land in injunction petition. — Previous condemnation proceeding by petition of the county authorities was not subject to attack by the present injunction petition of the former landowner, as containing an insufficient description of the condemned land, where the description in the former

proceeding identified the property as being described in plans on file in the office of the road commissioner of the county, and where the petition neither denied the existence of such plans and description nor alleged any fact showing their insufficiency. *Hoch v. Candler*, 190 Ga. 390, 9 S.E.2d 622 (1940).

Where charter of municipality requires adoption of valid ordinance as prerequisite to condemnation of private property, and such requirement is not complied with prior to the condemnation proceedings, the action will be enjoined. *Marist Soc'y v. City of Atlanta*, 212 Ga. 115, 90 S.E.2d 564 (1955).

Cited in *State Hwy. Dep't v. H.G. Hastings Co.*, 187 Ga. 204, 199 S.E. 793 (1938); *Stewart v. Board of Comm'rs*, 66 Ga. App. 108, 17 S.E.2d 203 (1941); *United States v. A Certain Tract or Parcel of Land*, 47 F. Supp. 30 (S.D. Ga. 1942); *Patterson v. State Hwy. Dep't*, 201 Ga. 860, 41 S.E.2d 260 (1947); *Cable v. State Hwy. Bd.*, 208 Ga. 593, 68 S.E.2d 564 (1952); *City of Atlanta v. Wilson*, 209 Ga. 527, 74 S.E.2d 455 (1953); *State Hwy. Dep't v. Hendrix*, 215 Ga. 821, 113 S.E.2d 761 (1960); *Cureton v. Cureton*, 218 Ga. 88, 126 S.E.2d 666 (1962); *State Hwy. Dep't v. Robinson*, 107 Ga. App. 854, 131 S.E.2d 786 (1963); *Varnadoe v. Housing Auth.*, 221 Ga. 467, 145 S.E.2d 493 (1965).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Eminent Domain, §§ 379, 380, 390, 391, 419-442.

C.J.S. — 29A C.J.S., Eminent Domain, §§ 196-205. 30 C.J.S., Eminent Domain, §§ 276-291.

ALR. — Condemnation by de facto corporation, 44 ALR 542.

Condemnation of public utility property for public utility purposes, 173 ALR 1362.

22-2-131. Contents of petition.

(a) The petition referred to in Code Section 22-2-130 shall set forth:

- (1) The facts showing the right to condemn;
- (2) The property or interest to be taken or damaged;
- (3) The names and residences of the persons whose property or interests are to be taken or otherwise affected, so far as known;

(4) A description of any unknown persons or classes of unknown persons whose rights in the property or interest are to be affected;

(5) Such other facts as are necessary for a full understanding of the cause; and

(6) A prayer for such judgment of condemnation as may be proper and desired.

(b) If any of the persons referred to in this Code section are minors or under disability, the fact shall be stated. (Ga. L. 1914, p. 92, § 2; Code 1933, § 36-1105.)

JUDICIAL DECISIONS

It is not necessary that condemnation petition allege unsuccessful effort to procure land by contract or a failure to agree as to compensation. *Hoch v. Candler*, 190 Ga. 390, 9 S.E.2d 622 (1940).

Where petition for condemnation as amended fully meets requirements of this section, the trial judge does not err in

overruling a general demurrer (now motion to dismiss). *Martin v. Fulton County*, 213 Ga. 761, 101 S.E.2d 716 (1958).

Cited in *United States v. A Certain Tract or Parcel of Land*, 47 F. Supp. 30 (S.D. Ga. 1942); *State Hwy. Dep't v. Hendrix*, 215 Ga. 821, 113 S.E.2d 761 (1960).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Eminent Domain, §§ 395, 396.

C.J.S. — 29A C.J.S., Eminent Domain, §§ 250-261.

22-2-132. Order to appear, etc.; directions for notice and service thereof; attachment of process to petition; cause to proceed as in rem.

(a) Upon presentation of the petition, the presiding judge may issue an order requiring the condemnor, the owner of the property or of any interest therein, and the representative of any owner to appear at a time and place named in the order and make known their objections, rights, or claims as to the value of the property or of their interest therein, and any other matters material to their respective rights.

(b) The day named in the order shall be as early as may be convenient, due regard being given to the necessities of notice.

(c) The order shall give appropriate directions for notice and the service thereof.

(d) It shall not be necessary to attach any other process to the petition except the order referred to in subsection (a) of this Code section, and the cause shall proceed as in rem. (Ga. L. 1914, p. 92, § 3; Code 1933, § 36-1106.)

JUDICIAL DECISIONS

This section specifically provides nature and character of objections which may be urged before the presiding judge, which include “any other matters material to their respective rights”; matters pertaining to the rights of the condemnee might therefore be raised by general and special demurrers as in other cases, and an adverse ruling on a general demurrer can be reviewed by a direct bill of exceptions prior to any final judgment in the condemnation case. *Martin v. Fulton County*, 213 Ga. 761, 101 S.E.2d 716 (1958).

Court may enjoin condemnor from taking possession of and entering upon land until the issues made by the petition and defensive pleadings have been determined. *Mitchell v. State Hwy. Dep’t*, 216

Ga. 517, 118 S.E.2d 88 (1961).

Separate suit in equity to enjoin condemnation will not lie. — Since adequate and complete relief, equitable as well as legal, is afforded any person aggrieved by a condemnation proceeding brought under this article, a separate suit in equity will not lie to enjoin the condemnation proceeding or to contest the constitutionality of the Act under which condemnation is proceeding. *Mitchell v. State Hwy. Dep’t*, 216 Ga. 517, 118 S.E.2d 88 (1961).

Cited in *State Hwy. Dep’t v. H.G. Hastings Co.*, 187 Ga. 204, 199 S.E. 793 (1938); *United States v. A Certain Tract or Parcel of Land*, 47 F. Supp. 30 (S.D. Ga. 1942); *State Hwy. Dep’t v. Hendrix*, 215 Ga. 821, 113 S.E.2d 761 (1960).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Eminent Domain, § 393.
C.J.S. — 29A C.J.S., Eminent Domain,

§§ 242-244. 72 C.J.S., Process, §§ 43 et seq., 73, 74.

22-2-133. Service of process — Generally.

All persons entitled to notice under the facts stated in the petition who are sui juris and within this state and whose residence is known shall be served by the sheriff with a copy of the petition and order as in other causes at law, unless such service is waived in writing. All other service shall be made in the method pointed out by Part 2 of Article 1 of Chapter 2 of this title, and all persons so served shall be deemed parties to the cause. (Ga. L. 1914, p. 92, § 3; Code 1933, § 36-1107.)

JUDICIAL DECISIONS

Cited in *United States v. A Certain Tract or Parcel of Land*, 47 F. Supp. 30 (S.D. Ga.

1942); *State Hwy. Dep’t v. Hendrix*, 215 Ga. 821, 113 S.E.2d 761 (1960).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Eminent Domain, §§ 391, 393, 394.
C.J.S. — 29A C.J.S., Eminent Domain,

§§ 245-249. 72 C.J.S., Process, §§ 43 et seq., 73, 74.

22-2-134. Same — Discretion of judge to cause additional notice or service to be given; notification of tax collector or tax commissioner.

In any cases where it seems to the presiding judge to be in the interest of justice and of more effective notice to cause additional notice or service to be given, it shall be within his discretion so to order. In such cases, the additional notice and service shall be made as ordered before the cause proceeds to final hearing. In cases where any taxes are alleged or supposed to be due or unpaid, the order shall direct that a separate notice to that effect be given the proper tax collector or tax commissioner. (Ga. L. 1914, p. 92, § 3; Code 1933, § 36-1108.)

JUDICIAL DECISIONS

Cited in *United States v. A Certain Tract or Parcel of Land*, 47 F. Supp. 30 (S.D. Ga. 1942); *State Hwy. Dep't v. Hendrix*, 215 Ga. 821, 113 S.E.2d 761 (1960).

RESEARCH REFERENCES

C.J.S. — 72 C.J.S., Process, §§ 43 et seq., 73, 74.

22-2-135. Appointment of assessors; discretion of judge to have issues tried in first instance by jury.

On the day named in the order made pursuant to Code Section 22-2-132, or at any other time to which the hearing may be continued, the court, having first passed on and adjudged all questions touching service and notice, shall, after hearing from all persons responding and desiring to be heard, make such order as to the appointment of assessors as shall conform most nearly to Article 1 of this chapter and give all interested persons equal rights in the selection thereof. If, by reason of conflicting interests or otherwise, such equality of right cannot be preserved, the judge shall himself make such order on the subject as shall secure a fair and impartial assessment or may in his discretion order the issues tried in the first instance by a jury. In any event, it shall be within the power of the court to hear the cause as speedily as may be consistent with justice and due process of law. (Ga. L. 1914, p. 92, § 4; Code 1933, § 36-1109.)

JUDICIAL DECISIONS

Purpose of this special condemnation statute is to afford a speedy and fair means whereby the public authorities may acquire a clear title to the lands sought for public purposes, and the landowner and all parties concerned may receive their just

compensation therefor. *Denham v. State Hwy. Bd.*, 52 Ga. App. 790, 184 S.E. 631 (1936).

It is within judge's discretion to determine disposition of preliminaries in the proceeding. *Denham v. State Hwy. Bd.*, 52 Ga. App. 790, 184 S.E. 631 (1936).

Cited in *United States v. A Certain Tract or Parcel of Land*, 47 F. Supp. 30 (S.D. Ga.

1942); *Patterson v. State Hwy. Dep't*, 201 Ga. 860, 41 S.E.2d 260 (1947); *State Hwy. Dep't v. Hendrix*, 215 Ga. 821, 113 S.E.2d 761 (1960); *State Hwy. Dep't v. Taylor*, 102 Ga. App. 15, 115 S.E.2d 703 (1960); *Housing Auth. v. Mercer*, 123 Ga. App. 38, 179 S.E.2d 275 (1970); *Fourth Nat'l Bank v. Grant*, 140 Ga. App. 78, 230 S.E.2d 60 (1976).

OPINIONS OF THE ATTORNEY GENERAL

Award must be tendered or paid before condemnor can enter upon land. — The full sum awarded in any condemnation proceeding must be tendered to the condemnee, or paid into court in the event the condemnee refuses to accept payment, before the condemnor may enter upon, occupy, or subject the land to its use. 1967 Op. Att'y Gen. No. 67-108.

Or before condemnor can appeal award. — It is not necessary for the agency bringing condemnation proceedings to

place any appraised amount in trust prior to a court ruling; however, if assessors are appointed as provided in this section, the condemning authority cannot appeal the assessors' award without tender of the amount of the award to the condemnee or payment into the registry of the court. 1967 Op. Att'y Gen. No. 67-108.

Soil and water conservation district need not have funds on hand merely to institute condemnation proceeding. 1967 Op. Att'y Gen. No. 67-108.

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Eminent Domain, §§ 406-411.

C.J.S. — 30 C.J.S., Eminent Domain, §§ 276-304.

ALR. — Right of court to reduce or increase award in condemnation and confirm it as reduced or increased, 61 ALR 194.

Right to intervene in court review of zoning proceeding, 46 ALR2d 1059.

Right of adjoining landowners to intervene in condemnation proceedings on ground that they might suffer consequential damage, 61 ALR2d 1292.

How to obtain jury trial in eminent domain: waiver, 12 ALR3d 7.

Eminent domain: determination of just compensation for condemnation of billboards or other advertising signs, 73 ALR3d 1122.

22-2-136. Appeal from assessors' award.

In case assessors are appointed, the same right of appeal shall lie from their award to a jury in the superior court, as is provided in Part 5 of Article 1 of this chapter and upon like terms and conditions in all respects as are therein provided. (Ga. L. 1914, p. 92, § 4; Code 1933, § 36-1110.)

JUDICIAL DECISIONS

Appeal from condemnation award under this section is de novo investigation. *State Hwy. Dep't v. Hester*, 112 Ga.

App. 51, 143 S.E.2d 658 (1965).

Appeal from award of assessors to jury in superior court is not a suit within the

provisions of § 44-12-21. *State Hwy. Dep't v. Noble*, 220 Ga. 410, 139 S.E.2d 318 (1964).

And such appeal does not require any process as is required in all suits at law. *State Hwy. Dep't v. Noble*, 220 Ga. 410, 139 S.E.2d 318 (1964).

Exceptions should be preserved pendente lite and presented after final judgment. — A condemnee in a proceeding under this article cannot bring a bill of exceptions reviewing a judgment overruling a demurrer to the petition, or a motion refusing a nonsuit, but should preserve her exceptions pendente lite, and come to the appellate court only after final judgment as provided in § 22-2-80. *Denham v. State Hwy. Bd.*, 52 Ga. App. 790, 184 S.E. 631 (1936).

Requirement of payment of costs is for benefit of officers of court and not a condition precedent to the filing of an appeal. *Hilderbrand v. Housing Auth.*, 109 Ga. App. 297, 136 S.E.2d 24 (1964).

Clerk is not bound to receive appeal until costs have been paid to him, but if the clerk does receive an appeal without exacting the costs, the appeal is good, and the clerk becomes estopped from saying that the costs have not been paid to him — estopped as to all persons, at least, except the appellant. *Hilderbrand v. Housing Auth.*, 109 Ga. App. 297, 136 S.E.2d 24 (1964).

Failure of condemnor to pay costs and fees within ten days after judgment does not vitiate its appeal therefrom regardless of whether or not it is a political subdivision of the state. *Hilderbrand v. Housing Auth.*, 109 Ga. App. 297, 136 S.E.2d 24 (1964).

Waiver of right to have costs paid in advance. — Where a magistrate refuses to dismiss an appeal because costs have not been paid by the appellant, this amounts to a waiver of his right to have the costs paid

in advance, and the appellee has no right to complain of the refusal to dismiss the appeal. *Hilderbrand v. Housing Auth.*, 109 Ga. App. 297, 136 S.E.2d 24 (1964).

Party's failure to sign appeal brought under this section is amendable defect and it is error for the court to strike the amendment tendered at the trial on appeal prior to the introduction of evidence and to dismiss the appeal. *State Hwy. Dep't v. Hester*, 112 Ga. App. 51, 143 S.E.2d 658 (1965).

Tender of award to condemnee not condition precedent to condemnor's appeal. — Tender of the amount of the award of the assessors to the apparent or ostensible owner of the land involved is not a condition precedent to the condemnor's right to enter an appeal to a jury, when the amount of the award has been paid into the registry of the court within the time provided by law for the filing of an appeal. *State Hwy. Dep't v. Taylor*, 216 Ga. 90, 115 S.E.2d 188 (1960).

Receipt of money does not preclude condemnee from attacking appeal. — Where the amount of the assessors' award is paid into the registry of the court, and thereafter paid to the condemnee, the condemnee is not precluded, by receiving the money, from attacking the validity of the appeal or moving for its dismissal. *State Hwy. Dep't v. Taylor*, 216 Ga. 90, 115 S.E.2d 188 (1960).

Cited in *United States v. A Certain Tract or Parcel of Land*, 47 F. Supp. 30 (S.D. Ga. 1942); *Wilson v. State Hwy. Dep't*, 85 Ga. App. 907, 70 S.E.2d 535 (1952); *Murray v. State Hwy. Dep't*, 103 Ga. App. 517, 120 S.E.2d 48 (1961); *Alexander v. Rozetta*, 110 Ga. App. 660, 139 S.E.2d 451 (1964); *Adams v. Housing Auth.*, 117 Ga. App. 646, 161 S.E.2d 444 (1968); *Hinton v. Georgia Power Co.*, 126 Ga. App. 416, 190 S.E.2d 811 (1972).

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Appeal and Error, §§ 146, 188. 27 Am. Jur. 2d, Eminent Domain, §§ 468-472.

C.J.S. — 30 C.J.S., Eminent Domain, §§ 343-372.

ALR. — Right to intervene in court

review of zoning proceeding, 46 ALR2d 1059.

Right of adjoining landowners to intervene in condemnation proceedings on ground that they might suffer consequential damage, 61 ALR2d 1292.

Liability, upon abandonment of eminent domain proceedings, for loss or expenses incurred by property owner, or for interest on award or judgment, 92 ALR2d 355.

22-2-137. Factors to be considered in determining or estimating just and adequate compensation; determination of date of taking; inclusion of date of approval of original location of highway in petition for condemnation; newspaper advertisement as to original location of highway, date of location, etc.

(a) In determining or estimating just and adequate compensation to be paid to the owner of any property or interest condemned for public road and street purposes, neither the board of assessors nor the jury, in the event of an appeal to a jury, shall be restricted to the agricultural or productive qualities of the land; but inquiry shall be made as to all other legitimate purposes to which the land could be appropriated. The date of taking as contemplated in this Code section shall be the date of the filing of the condemnation proceedings for the acquisition of the property or interest.

(b) The condemning authority shall cause the petition for condemnation to set forth the date of the approval of the original location of the highway. It shall be the further duty of the condemning authority, within 30 days from the date of the original approval and designation of said location as a highway, to cause the location of said highway in said county to be advertised once each week for four consecutive weeks in the newspaper of the county in which the sheriff's advertisements are carried; and said advertisement shall designate the land lots or land districts of said county through which such highway will be located. Said advertisement shall further show the date of the said original location of such highway as hereinbefore provided for in this subsection. Said advertisement shall further state that a plat or map of the project showing the exact date of original location is on file at the office of the Department of Transportation and that any interested party may obtain a copy of same by writing to the Department of Transportation (2 Capitol Square, Atlanta, Georgia 30334) and paying a nominal cost therefor.

(c) In determining just and adequate compensation for property or interests taken or condemned for public road and street purposes, the award of the board of assessors or the verdict of the jury, in the event of an appeal, shall, in addition to fixing the value of the land actually taken and used for such purposes, take into consideration the prospective and consequential damages to the remaining property or interest from which the property or interest actually taken was cut off, which consequential damages result to such remaining property or interest because of the location of such public road or street upon the portion actually taken. In addition, the increase of the value of such remaining property or interest from the location of such public road or street shall be considered. Such

consequential benefits, if any, may be offset against such consequential damages, if any; but in no event shall consequential benefits be offset against the value of the property or interest actually taken for such public improvement. (Code 1933, § 36-1117, enacted by Ga. L. 1966, p. 320, § 1.)

Law reviews. — For comment on State Hwy. Dep't v. Lumpkin, 222 Ga. 727, 152

S.E.2d 557 (1966), see 3 Ga. St. B.J. 483 (1967).

JUDICIAL DECISIONS

What is just and adequate compensation is justiciable question, and only the judiciary can lawfully determine that question. Calhoun v. State Hwy. Dep't, 223 Ga. 65, 153 S.E.2d 418 (1967).

There are only two elements of damages to be considered in condemnation proceeding: first, the market value of the property actually taken; second, the consequential damage that will naturally and proximately arise to the remainder of the owner's property from the taking of the part which is taken and the devoting of it to the purposes for which it is condemned. Simon v. Department of Transp., 245 Ga. 478, 265 S.E.2d 777 (1980).

Measure of damages is pecuniary loss sustained by owner. — The measure of damages for property taken by the right of eminent domain, being compensatory in its nature, is the pecuniary loss sustained by the owner, taking into consideration all relevant factors. Ordinarily this loss is represented by the fair market value of the property interest taken, but it may be the fair and reasonable value of the property taken if in fact the market value would not coincide with the actual value thereof. Polk v. Fulton County, 96 Ga. App. 733, 101 S.E.2d 736 (1957).

Anything that actually enhances value of land must be considered in order to meet the constitutional demand that the owner be paid before the taking, adequate and just compensation. Department of Transp. v. Arnold, 154 Ga. App. 502, 268 S.E.2d 775 (1980).

There are three recognized techniques for determining market value: replacement cost new less depreciation, income, and comparable sales. Housing Auth. v. Southern Ry., 245 Ga. 229, 264 S.E.2d 174 (1980).

Measure of consequential damages if any, to the property which the condemnee retains, is the market value of the remainder in its circumstances just prior to the time of the taking, as compared with its market value in its new circumstances just after the time of the taking. Simon v. Department of Transp., 245 Ga. 478, 265 S.E.2d 777 (1980).

Land and its natural components are one subject matter and what is required is evidence of the fair market value of that one subject matter. Department of Transp. v. Brooks, 153 Ga. App. 386, 265 S.E.2d 610 (1980).

Improvements on land are proper subjects for independent valuation in consideration of the just and adequate compensation for the total property taken. Department of Transp. v. Brooks, 153 Ga. App. 386, 265 S.E.2d 610 (1980).

Existing zoning regulations can be pertinent in a condemnation proceeding. Department of Transp. v. Brooks, 153 Ga. App. 386, 265 S.E.2d 610 (1980).

Attorneys' fees need not be included in the measure of just compensation under the Georgia Constitution. Georgia Power Co. v. Sanders, 617 F.2d 1112 (5th Cir. 1980).

Lost profits may be used as means of awarding just and adequate compensation because the income approach necessarily takes into account what future earnings would be were the property interest not extinguished. Housing Auth. v. Southern Ry., 245 Ga. 229, 264 S.E.2d 174 (1980).

Property is "unique" where fair market value will not afford just compensation. — Since valuing property at its fair market value presupposes a willing buyer and a

willing seller, properties are "unique" such that fair market value will not afford just and adequate compensation when they are not of type generally bought or sold in the open market. *Housing Auth. v. Southern Ry.*, 245 Ga. 229, 264 S.E.2d 174 (1980).

Whether or not property is unique is a jury question. *Dixie Hwy. Bottle Shop, Inc. v. Department of Transp.*, 150 Ga. App. 839, 258 S.E.2d 646 (1979); *Department of Transp. v. Dixie Hwy. Bottle Shop, Inc.*, 245 Ga. 314, 265 S.E.2d 10 (1980).

"Unique" property is measured by variety of nonfair market methods of valuation, including the cost and income methods. *Housing Auth. v. Southern Ry.*, 245 Ga. 229, 264 S.E.2d 174 (1980).

Recovery of business losses. — Business losses are recoverable as a separate item only if the property is "unique." *Department of Transp. v. Dixie Hwy. Bottle Shop, Inc.*, 245 Ga. 314, 265 S.E.2d 10 (1980).

When a business belongs to the landowner, total destruction of the business at the location must be proven before business losses may be recovered as a separate element of compensation. *Department of Transp. v. Dixie Hwy. Bottle Shop, Inc.*, 245 Ga. 314, 265 S.E.2d 10 (1980).

When the business belongs to a separate lessee, the lessee may recover for business losses as an element of compensation separate from the value of the land whether the destruction of his business is total or merely partial, provided only that the loss is not remote or speculative. *Department of Transp. v. Dixie Hwy. Bottle Shop, Inc.*,

245 Ga. 314, 265 S.E.2d 10 (1980).

Jury consideration of actual value of land. — While there may be circumstances in which the market value of the total property and the actual value of the improvements plus the actual value of the land are not the same, in such event the jury may still consider the actual value of the land or interest therein appropriated. *Department of Transp. v. Brooks*, 153 Ga. App. 386, 265 S.E.2d 610 (1980).

Condemnor's testimony, standing alone, held inadmissible on question of consequential damages. — Where a limited access highway is condemned by the State, which highway cuts off several acres from the remainder of the land of the condemnee leaving those several acres without any access thereto, testimony offered by the condemnor that with access there would be no damage to the isolated land, standing alone, is inadmissible and without probative value on the question of consequential damages to those several acres without access. *State Hwy. Dep't v. Howard*, 124 Ga. App. 76, 183 S.E.2d 26 (1971).

Value finding will not be set aside if within range of evidence. — A value finding in a condemnation case will not be set aside on appeal as inadequate or excessive where it is within the range of the evidence. *Freedman v. Housing Auth.*, 108 Ga. App. 418; 136 S.E.2d 544 (1963).

Cited in *City of Douglas v. Rigdon*, 116 Ga. App. 306, 157 S.E.2d 66 (1967).

RESEARCH REFERENCES

Am. Jur. 2d. — 26 Am. Jur. 2d, *Eminent Domain*, §§ 150-156. 27 Am. Jur. 2d, *Eminent Domain*, §§ 266-296, 310-320, 357-374, 427-442.

C.J.S. — 25A C.J.S., *Damages*, § 2.

ALR. — Measure of damages or compensation where property is taken to widen street, 64 ALR 1513.

Right of property owner to compensation for diversion of traffic by relocation or rerouting of highway, 118 ALR 921.

Deduction of benefits in determining compensation or damages in eminent domain, 145 ALR 7.

What physical construction amounts to a change of grade within statute relating to award of damages, 156 ALR 416.

Measure of compensation in eminent domain to be paid to state or municipality for taking of public highway or street, 160 ALR 955.

Unity or contiguity of properties essential to allowance of damages in eminent domain proceedings on account of remaining property, 6 ALR2d 1197.

Compensation for, or extent of rights acquired by, taking of land, as affected by condemner's promissory statements as to

character of use or undertakings to be performed by it, 7 ALR2d 364.

Admissibility, in eminent domain proceedings, of evidence as to price paid for condemned real property during pendency of the proceeding, 55 ALR2d 781.

Admissibility, in eminent domain proceeding, of evidence as to price paid for condemned real property on sale prior to the proceeding, 55 ALR2d 791.

Fire risk or hazard as element of damages in condemnation proceedings, 63 ALR2d 313.

Interference with view as matter for consideration in eminent domain, 84 ALR2d 348.

Changes in purchasing power of money as affecting compensation in eminent domain proceedings, 92 ALR2d 772.

Unity of ownership necessary to allowance of severance damages in eminent domain, 95 ALR2d 887.

Eminent domain: use or improvement of highway as establishing grade necessary to entitle abutting owner to compensation on subsequent change, 2 ALR3d 985.

Eminent domain: restrictive covenant or right to enforcement thereof as compensable property right, 4 ALR3d 1137.

Propriety and effect, in eminent domain proceedings, of argument or evidence as to source of funds to pay for property, 19 ALR3d 694.

Eminent domain: admissibility, on issue of value of condemned real property, of rental value of other real property, 23 ALR3d 724.

Measure and elements of damage for limitation of access caused by conversion of conventional road into limited-access highway, 42 ALR3d 148.

Condemned property's location in relation to proposed site of building complex or similar improvement as factor in fixing compensation, 51 ALR3d 1050.

Eminent domain: determination of just compensation for condemnation of billboards or other advertising signs, 73 ALR3d 1122.

Good will as element of damages for condemnation of property on which private business is conducted, 81 ALR3d 198.

Eminent domain: right of owner of land not originally taken or purchased as part of adjacent project to recover, on enlargement of project to include adjacent land, enhanced value of property by reason of proximity to original land — state cases, 95 ALR3d 752.

Unsightliness of powerline or other wire, or related structure, as element of damages in easement condemnation proceeding, 97 ALR3d 587.

Eminent domain: recovery of value of improvements made with knowledge of impending condemnation, 98 ALR3d 504.

22-2-138. Scope of award or verdict; molding of award or verdict; power of court to adjudge condemnation of title upon deposit of amount of award or verdict into court; disposition of award by court.

The award or verdict, as the case may be, shall have respect either to the entire and unencumbered fee or to any separate claim against or interest in the property, as the court may order. The award or verdict may be molded under the direction of the court so as to do complete justice and avoid confusion of interests. It shall be within the power of the court, upon payment of the award or verdict into the registry of the court, to adjudge a condemnation of the title to the property or interest therein and give such direction as to the disposition of the fund as shall be proper, according to the rights of the several respondents, and to cause such pleadings to be filed and such issues to be made as shall be appropriate for an ascertainment and determination of such rights. (Ga. L. 1914, p. 92, § 5; Code 1933, § 36-1111.)

JUDICIAL DECISIONS

Purpose of this section is to require payment into the registry of the court so that a proper distribution can be made to all claimants of the fund. *City of Gainesville v. Loggins*, 224 Ga. 114, 160 S.E.2d 374 (1968).

Tender of award to owner not condition precedent to condemnor's appeal. — Tender of the amount of the award of the assessors to the apparent or ostensible owner of the land involved is not a condition precedent to the condemnor's right to enter an appeal to a jury, when the amount of the award has been paid into the registry of the court within the time provided by law for the filing of an appeal. *State Hwy. Dep't v. Taylor*, 216 Ga. 90, 115 S.E.2d 188 (1960).

Where real estate has been damaged by abutting street improvement made by city, the owner cannot recover any damage for an alleged decrease in the market value of the property where, by reason of the enhanced value of the property by virtue of the improvement, the market value of the property has not been decreased. *Stansell & Rape Bros. v. City of McDonough*, 50 Ga. App. 234, 177 S.E. 749 (1934).

Evidence of benefit to business from paving of street held admissible. — Competent evidence as to any improvement in or benefit to the business of certain property owners, conducted upon their city property, contiguous to and fronting on a street resulting from the paving of the

street by the city, would be admissible in a suit brought by the property owners against the city for damage to their property, as tending to show that petitioners' property has been enhanced in value by reason of such public improvement, in order to set off the damages claimed by the petitioners. *Stansell & Rape Bros. v. City of McDonough*, 50 Ga. App. 234, 177 S.E. 749 (1934).

The fact that other property, similarly situated, abutting upon the street paved, was also enhanced in value and received benefits from this improvement, is admissible to show in a general way that plaintiffs' property was also enhanced in value and received benefits from such paving. *Stansell & Rape Bros. v. City of McDonough*, 50 Ga. App. 234, 177 S.E. 749 (1934).

Cited in *State Hwy. Dep't v. H.G. Hastings Co.*, 187 Ga. 204, 199 S.E. 793 (1938); *United States v. A Certain Tract or Parcel of Land*, 47 F. Supp. 30 (S.D. Ga. 1942); *State Hwy. Dep't v. Peavy*, 204 Ga. 99, 48 S.E.2d 726 (1948); *Wilson v. State Hwy. Dep't*, 85 Ga. App. 907, 70 S.E.2d 535 (1952); *Golfland, Inc. v. Thomas*, 107 Ga. App. 563, 130 S.E.2d 757 (1963); *Alexander v. Rozetta*, 110 Ga. App. 660, 139 S.E.2d 451 (1964); *Fourth Nat'l Bank v. Grant*, 140 Ga. App. 78, 230 S.E.2d 60 (1976); *Department of Transp. v. Garrett*, 154 Ga. App. 104, 267 S.E.2d 643 (1980).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Eminent Domain, §§ 446, 447, 452.

C.J.S. — 30 C.J.S., Eminent Domain, §§ 306-318.

ALR. — Quotient condemnation report or award by commissioners or the like, 39 ALR2d 1208.

22-2-139. Right of interested persons to intervene; effect of subsequent proceedings on rights of condemnor.

Nothing in this article which refers to any ruling or order, or time for responding thereto, shall be held or construed to exclude any person by way of default from making known his rights or claims in the property or interest or in the fund arising therefrom. Any person making any such

claim may file appropriate pleadings or intervention at any time before verdict or award, and such person shall be fully heard thereon. If any person after judgment of condemnation desires to come in and be heard on any such claim, he shall be allowed to do so. After condemnation is had and the fund paid into the registry of the court, the condemnor shall not be concerned with or affected by any subsequent proceedings unless upon appeal from the verdict or award as provided in Code Section 22-2-136. (Ga. L. 1914, p. 92, § 7; Code 1933, § 36-1113.)

JUDICIAL DECISIONS

Court has power to enjoin condemnor from taking possession of and entering upon land until the issues made by the petition and defensive pleadings have been determined. *Mitchell v. State Hwy. Dep't*, 216 Ga. 517, 118 S.E.2d 88 (1961).

Citizens and taxpayers may seek to prevent illegal disposition of county property. — Citizens and taxpayers of a county have such an interest in county property as will authorize them to seek to prevent an illegal disposition thereof; and, in their efforts to do so, they may enlist the aid of equity to enjoin any such attempted disposition and to cancel deeds to and contracts of sale of county property by which such an illegal disposition of such property is sought to be effectuated. *Timbs v. Straub*, 216 Ga. 451, 117 S.E.2d 462 (1960).

Separate action will not lie to enjoin condemnation. — Since adequate and complete relief, equitable as well as legal, is afforded any person aggrieved by a condemnation proceeding brought under this article which permits intervention by such person in the condemnation proceeding itself, a separate action in equity will not lie to enjoin the condemnation proceeding or to contest the constitutionality of the act under which condemnation is proceeding. *Mitchell v. State Hwy. Dep't*, 216 Ga. 517, 118 S.E.2d 88 (1961).

Where condemnor pays award of assessors into registry of court as provided by this article, the condemnor is not thereafter concerned with its distribution.

Kruetz v. Housing Auth., 107 Ga. App. 315, 130 S.E.2d 134 (1963).

Service of notice upon executor who is also owner. — Although the plaintiff, in his capacity as executor, should have been served with notice of condemnation proceeding, the fact that he was served as one of eight "owners" of the land with notice gave him knowledge of the proceeding, and he could have intervened as executor to protect the interests of the estate under the provision of this section, that anyone claiming any interests or rights in the subject property might intervene in the condemnation proceeding, he was in no way harmed by reason of the condemnor's failure to give him official notice in his capacity as executor. *Mitchell v. State Hwy. Dep't*, 216 Ga. 517, 118 S.E.2d 88 (1961).

Fears of nuisance held too speculative to permit injunction. — Fears of abutting landowners that land condemned for use as a football stadium would become a nuisance were too speculative to permit the enjoining of the condemnation. *Herren v. Board of Educ.*, 219 Ga. 431, 134 S.E.2d 6 (1963).

Cited in *United States v. A Certain Tract or Parcel of Land*, 47 F. Supp. 30 (S.D. Ga. 1942); *Wilson v. State Hwy. Dep't*, 85 Ga. App. 907, 70 S.E.2d 535 (1952); *State Hwy. Dep't v. Hendrix*, 215 Ga. 821, 113 S.E.2d 761 (1960); *State Hwy. Dep't v. Taylor*, 216 Ga. 90, 115 S.E.2d 188 (1960); *Fourth Nat'l Bank v. Grant*, 140 Ga. App. 78, 230 S.E.2d 60 (1976).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Eminent Domain, §§ 392, 449-452.

C.J.S. — 29A C.J.S., Eminent Domain, §§ 205, 237.

ALR. — Right of adjoining landowners to intervene in condemnation proceedings on ground that they might suffer consequential damage, 61 ALR2d 1292.

22-2-140. Notification of court by tax collector or tax commissioner of taxes due on property or interest; actions by court to discharge lien.

It shall be the duty of any tax collector or tax commissioner notified as required in Code Section 22-2-134 to make known to the court in writing the taxes due on the property or interest; and the court shall give such direction as will satisfy the tax liability and discharge the lien thereon. (Ga. L. 1914, p. 92, § 8; Code 1933, § 36-1114.)

JUDICIAL DECISIONS

Cited in United States v. A Certain Tract or Parcel of Land, 47 F. Supp. 30 (S.D. Ga. 1942); State Hwy. Dep't v. Hendrix, 215 Ga. 821, 113 S.E.2d 761 (1960).

RESEARCH REFERENCES

ALR. — Rights in respect of real-estate taxes where property is taken in eminent domain, 45 ALR2d 522.

22-2-141. Filing and recording of award, decree, and description of condemned property or interest or copies thereof; payment of fees to clerk of superior court.

When the condemnation is fully completed, the award, whether made by assessors or by the verdict of a jury, together with the decree of the court based thereon and a full and complete description of the property or interest condemned or duly certified copies of such award, decree, and description, shall be filed and recorded in the records of deeds in the office of the clerk of the superior court of the county where the land so condemned lies. If the land lies in more than one county, such filing and recording shall be made in each county in which the land lies. The clerk shall be entitled to the same fees for such filing and recording as are allowed by law for the filing and recording of deeds, said fees to be paid by the party in whose favor said condemnation is had. (Ga. L. 1919, p. 231, § 1; Code 1933, § 36-1116.)

Cross references. — As to duty of clerk of superior court to maintain record of deeds, see § 15-6-61.

JUDICIAL DECISIONS

Cited in Department of Transp. v. Garrett, 154 Ga. App. 104, 267 S.E.2d 643 (1980).

RESEARCH REFERENCES

ALR. — Liability for costs in trial tribunal in eminent domain proceedings as affected by offer or tender by condemnor, 70 ALR2d 804.

22-2-142. Intent of article regarding effect on other methods of condemnation.

This article is intended to be supplementary to and cumulative of Articles 1 and 2 of this chapter in cases in which the State of Georgia, the United States, or any person having the privilege of exercising the right of eminent domain is concerned. This article is also intended to make simpler and more effective the method of condemnation in those cases where conflicting interests or doubtful questions render a judicial supervision of the procedure desirable. In all particulars not otherwise specially provided for in this article, the court shall conform its procedure as nearly as possible to Articles 1 and 2 of this chapter, and the same shall remain in force. (Ga. L. 1914, p. 92, § 9; Code 1933, § 36-1115; Ga. L. 1937-38, Ex. Sess., p. 251, § 1.)

JUDICIAL DECISIONS

Cited in State Hwy. Dep't v. H.G. Hastings Co., 187 Ga. 204, 199 S.E. 793 (1938); United States v. A Certain Tract or Parcel of Land, 47 F. Supp. 30 (S.D. Ga. 1942); Wilson v. State Hwy. Dep't, 85 Ga. App. 907, 70 S.E.2d 535 (1952); State Hwy. Dep't v. Hendrix, 215 Ga. 821, 113 S.E.2d 761 (1960); DeKalb County v. Jackson-Atlantic Co., 123 Ga. App. 695, 182 S.E.2d 160 (1971).

RESEARCH REFERENCES

ALR. — Condemnation by de facto corporation, 44 ALR 542.

SPECIAL PURPOSES

CHAPTER 3

EXERCISE OF POWER OF EMINENT DOMAIN FOR SPECIAL PURPOSES

Article 1

Construction, Maintenance, etc., of Telegraph and Telephone Lines Along Railroad Rights of Way

Sec.

- 22-3-1. Direction and contents of notice of condemnation.
- 22-3-2. Manner of service of notice.
- 22-3-3. Necessity for only one proceeding; location of proceedings; form of assessors' findings.
- 22-3-4. Location of hearing before assessors; evidence upon which findings may be based.

Article 2

Construction and Operation of Electric Power Plants

PART 1

GENERAL PROVISIONS

- 22-3-20. Power of persons operating, constructing, etc., electric plants to purchase, condemn, etc., rights of way and easements.
- 22-3-21. Payment of compensation or damages.
- 22-3-22. Condemnation of mills, factories, dams, etc.

PART 2

ACQUISITION OF RIGHT TO FLOOD ROADS AND HIGHWAYS

- 22-3-40. "Public road" and "public highway" defined.
- 22-3-41. Power to acquire right to flood roads and highways.
- 22-3-42. Notice of intention to condemn.
- 22-3-43. Condemnation procedure; authorization of officers to act for state or county.
- 22-3-44. Appeal to superior court.
- 22-3-45. Rights of condemnor pending appeal.
- 22-3-46. Restrictions on use of condemned road or highway by condemnor.

Sec.

- 22-3-47. Effect of part on rights of action of property owners and public utilities.

Article 3

Construction and Operation of Waterworks

- 22-3-60. Persons constructing, operating, etc., waterworks authorized to lease, purchase, condemn, etc., property or interests.
- 22-3-61. Condemnation procedure.
- 22-3-62. Applicability of article.

Article 4

Construction, Operation, etc., of Petroleum Pipelines and Gas Pipelines

- 22-3-80. Power of corporations constructing, operating, etc., petroleum pipelines to condemn property and interests owned by subdivisions of the state.
- 22-3-81. Traversing of streets, watercourses, etc., for pipeline purposes.
- 22-3-82. Description of corporations authorized to exercise powers under Code Sections 22-3-80 and 22-3-81.
- 22-3-83. Authority of persons constructing or operating gas pipelines or furnishing gas for heating, lighting, etc., purposes to exercise power of eminent domain.

Article 5

Construction, Operation, etc., of Water- shed Projects, Flood-Control Projects, etc., by Counties

- 22-3-100. Authority of counties to exercise power of eminent domain.
- 22-3-101. Condemnation procedure.
- 22-3-102. Requirement of condemnation of fee simple title to land to be flooded permanently.

Article 6

**Construction of Lighthouses, Beacons,
etc., by United States Government**

Sec.

22-3-120. Condemnation for construction
of lighthouses, beacons, etc.

22-3-121. Acquisition of right to enter

Sec.

lands and clear or cut timber for
purposes of carrying out survey
of coasts — Generally.22-3-122. Same — Manner of assessment
where parties cannot agree on
compensation.

Cross references. — As to right of State Transportation Board to exercise right of eminent domain to acquire sites for airports, landing fields, and air navigation facilities, see § 6-3-1. As to power of municipal and county housing authorities to exercise power of eminent domain generally, see § 8-3-31. As to exercise of power of eminent domain for public school

purposes, see § 20-2-521. As to authority of board of regents to exercise power of eminent domain, see § 20-3-58. As to authority of Department of Transportation to exercise power of eminent domain, see § 32-2-2(a)(8). As to exercise of power of eminent domain for public road purposes, see § 32-3-1 et seq.

ARTICLE 1

**CONSTRUCTION, MAINTENANCE, ETC., OF TELE-
GRAPH AND TELEPHONE LINES ALONG
RAILROAD RIGHTS OF WAY**

Cross references. — For similar provisions regarding exercise of power of eminent domain for purposes of constructing

and operating telephone and telegraph lines along public highways or railroad rights of way, see § 46-5-1.

JUDICIAL DECISIONS

This procedure affords due process of law to the railroad companies whose property is sought to be condemned. *Savannah F. & W. Ry. v. Postal Telegraph-Cable Co.*, 115 Ga. 554, 42 S.E. 1 (1902); *Western & A.R.R. v. Western Union Tel. Co.*, 138 Ga. 420, 75 S.E. 471, 42 L.R.A. (n.s.) 225 (1912).

The necessity for taking private property for public use is a question for legislative determination, and the provisions of this article relating to such taking are not, because they fail to provide for a special tribunal to pass upon such necessity, violative of the constitutional prohibition against taking the property without due process of law. *Savannah F. & W. Ry. v. Postal Telegraph-Cable Co.*, 115 Ga. 554, 42 S.E. 1 (1902).

Failure to provide for appeal does not render statute unconstitutional. —

Although a statute authorizing exercise of eminent domain may not provide for appeal from the award of the assessors, it is not, for this reason, unconstitutional. *Savannah F. & W. Ry. v. Postal Telegraph-Cable Co.*, 112 Ga. 941, 38 S.E. 353 (1901).

Party with right to condemn has large discretion in selection of particular property to be condemned; therefore, in the absence of bad faith, the determination by the condemnor of reasonable necessity for acquiring the condemnee's land cannot be disturbed by a court on appeal. *Harwell v. Georgia Power Co.*, 154 Ga. App. 142, 267 S.E.2d 769 (1980).

Telegraph company does not acquire fee, but only easement in right of way of a railway company condemned for the purpose of constructing a telegraph line; the easement embraces land actually occupied by poles and fixtures for guy wires, the right to stretch wires on poles, and to enter upon right of way to construct and repair telegraph line. *Atlantic C.L.R.R. v. Postal Telegraph-Cable Co.*, 120 Ga. 268, 48 S.E. 15, 1 Ann. Cas. 734 (1904).

Proposed telegraph line must produce no material interference with railroad operation. — A telegraph company may condemn a right of way on and along the right of way of a railroad company, when the proposed line of telegraph will be so constructed as to produce no material interference with the railroad company's free exercise of its franchise or with the actual operation of the railroad. *Western & A.R.R. v. Western Union Tel. Co.*, 138 Ga. 420, 75 S.E. 471, 42 L.R.A. (n.s.) 225 (1912).

This article does not contemplate that telegraph company can arbitrarily condemn both sides of railroad track for the construction of lines on both sides of the track, when the necessary wires could be strung upon poles on one side of the track. *Western & A.R.R. v. Western Union Tel. Co.*, 138 Ga. 420, 75 S.E. 471, 42 L.R.A. (n.s.) 225 (1912).

Elements to be considered in determination of damages. — See *Atlantic C.L.R.R. v. Postal Telegraph-Cable Co.*, 120 Ga. 268, 48 S.E. 15, 1 Ann. Cas. 734 (1904); *Western & A.R.R. v. Western Union Tel. Co.*, 138 Ga. 420, 75 S.E. 471, 42 L.R.A. (n.s.) 225 (1912).

Measure of damages in condemnation case under this article is value of land actually taken, and the extent to which the value and use of the right of way by the railway company is diminished by its use by the telegraph company. *Atlantic C.L.R.R. v. Postal Telegraph-Cable Co.*, 120 Ga. 268, 48 S.E. 15, 1 Ann. Cas. 734 (1904).

Value of right of way for other uses cannot be considered. — In arriving at the

value of the land actually appropriated, the general salable value of the right of way for other uses than that to which it is applied by the railway company cannot be considered; the appropriation to public use amounts to a withdrawal of the right of way from any use except that which is necessary or ancillary to the operation of the railroad. *Atlantic C.L.R.R. v. Postal Telegraph-Cable Co.*, 120 Ga. 268, 48 S.E. 15, 1 Ann. Cas. 734 (1904).

Peculiar advantages of right of way not proper element of damages. — That the right of way may possess peculiar advantages and benefits to the telegraph company in the construction and maintenance of its line is not a proper element in the estimate of damages. *Atlantic C.L.R.R. v. Postal Telegraph-Cable Co.*, 120 Ga. 268, 48 S.E. 15, 1 Ann. Cas. 734 (1904).

Appeal from assessors' award under § 22-2-80 is permitted in a proceeding under this article. *Atlantic C.L.R.R. v. Postal Telegraph-Cable Co.*, 120 Ga. 268, 48 S.E. 15, 1 Ann. Cas. 734 (1904).

Amount of compensation is issue of fact for jury on appeal. — On appeal from the award of the assessors in a condemnation proceeding, the issue of fact for the jury is the amount of compensation to be paid for the property taken or damaged for public purposes. *Atlantic C.L.R.R. v. Postal Telegraph-Cable Co.*, 120 Ga. 268, 48 S.E. 15, 1 Ann. Cas. 734 (1904).

Telegraph company may begin construction pending appeal after depositing award. — A telegraph company which has proceeded to condemn a sufficiency of the right of way of railway company for purpose of erecting a telegraph line may, pending an appeal from the award of the assessors, lawfully proceed to construct its line on the right of way after it has deposited the amount of the award in the office of the clerk of the superior court of the county where such proceedings were had. *Savannah F. & W. Ry. v. Postal Telegraph-Cable Co.*, 115 Ga. 554, 42 S.E. 1 (1902).

RESEARCH REFERENCES

Am. Jur. 2d. — 26 Am. Jur. 2d, Eminent Domain, §§ 20, 58, 98, 99, 102, 126, 138, 185, 214. 27 Am. Jur. 2d, Eminent Domain, § 336.

C.J.S. — 29A C.J.S., Eminent Domain, §§ 24, 44, 89-95.

ALR. — Right to and measure of compensation to owner of fee when telegraph or telephone line is erected along railroad right of way or highway, 19 ALR 383.

Limitation applicable to action or pro-

ceeding by owner for compensation where property is taken in exercise of eminent domain without antecedent condemnation proceeding, 123 ALR 676.

Condemnation of premises or part thereof as affecting rights of landlord and tenant inter se, 163 ALR 679.

Condemnor's waiver, surrender, or limitation, after award, of rights or part of property acquired by condemnation, 5 ALR2d 724.

22-3-1. Direction and contents of notice of condemnation.

When a telegraph or telephone company undertakes to condemn so much of the right of way of a railroad company as may be necessary for the purpose of constructing, maintaining, and operating its telegraph or telephone lines along and upon such right of way, the notice of condemnation provided for in Code Section 22-2-26 shall be directed to the railroad company and shall:

(1) Set out the manner in which the telegraph or telephone company proposes to construct its lines on the right of way of the railroad company;

(2) Fix the time when the hearing shall be had;

(3) Give the name of the assessor selected by the telegraph or telephone company; and

(4) Request the railroad company to select an assessor. (Ga. L. 1898, p. 54, § 1; Civil Code 1910, § 5236; Code 1933, § 36-701.)

JUDICIAL DECISIONS

Notice held sufficient. — See Savannah F. & W. Ry. v. Postal Telegraph-Cable Co., 115 Ga. 554, 42 S.E. 1 (1902).

Cited in *Pye v. State Hwy. Dep't*, 226 Ga. 389, 175 S.E.2d 510 (1970).

RESEARCH REFERENCES

Am. Jur. 2d. — 26 Am. Jur. 2d, Eminent Domain, §§ 98, 99, 102, 126, 127, 138, 185. 27 Am. Jur. 2d, Eminent Domain, §§ 336, 393, 394.

C.J.S. — 29A C.J.S., Eminent Domain, §§ 44, 79, 242-244.

ALR. — Right of carrier to discriminate

between telegraph or telephone companies, 60 ALR 1081.

Compensation for, or extent of rights acquired by, taking of land, as affected by condemnor's promissory statements as to character of use or undertakings to be performed by it, 7 ALR2d 364.

Admissibility, in eminent domain proceeding, of evidence as to price paid for condemned real property during pendency of the proceeding, 55 ALR2d 781.

Admissibility, in eminent domain proceeding, of evidence as to price paid for condemned real property on sale prior to the proceeding, 55 ALR2d 791.

Right to condemn property in excess of needs for a particular public purpose, 6 ALR3d 297.

Eminent domain: validity of appropriation of property for anticipated future use, 80 ALR3d 1071.

Applicability of zoning regulations to projects of nongovernmental public utility as affected by utility's having power of eminent domain, 87 ALR3d 1265.

Eminent domain: recovery of value of improvements made with knowledge of impending condemnation, 98 ALR3d 504.

22-3-2. Manner of service of notice.

Notice of condemnation shall be served upon the railroad company in the manner provided for the service of other actions upon railroad companies. It shall not be necessary to serve such notice upon any person or corporation other than the railroad company in possession of and operating the railroad whose right of way is sought to be condemned by the telegraph or telephone company for its use; and only the interest of such railroad company so served shall be affected by the proceedings. (Ga. L. 1898, p. 54, § 1; Civil Code 1910, § 5237; Code 1933, § 36-702.)

JUDICIAL DECISIONS

This procedure affords due process of law to the railroad companies whose property is sought to be condemned. Savannah F. & W. Ry. v. Postal Telegraph-Cable Co.,

115 Ga. 554, 42 S.E. 1 (1902); Western & A.R.R. v. Western Union Tel. Co., 138 Ga. 420, 75 S.E. 471, 42 L.R.A. (n.s.) 225 (1912).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Eminent Domain, §§ 391, 394.

C.J.S. — 30 C.J.S., Eminent Domain, §§ 245-249.

ALR. — Eminent domain: permissible modes of service of notice of proceedings, 89 ALR2d 1404.

22-3-3. Necessity for only one proceeding; location of proceedings; form of assessors' findings.

There need be but one condemnation proceeding against the same railroad company, which proceeding may be conducted in any county where service can be made upon the company as provided in Code Section 22-3-2. However, if the railroad company has a main or principal office located in this state, the proceeding shall be conducted in the county in which the main or principal office is located. The assessors shall make their findings of the damages to which the railroad company may

be entitled by reason of the construction, maintenance, and operation of the telegraph or telephone lines in the manner set out in the notice. (Ga. L. 1898, p. 54, § 1; Civil Code 1910, § 5238; Code 1933, § 36-703.)

RESEARCH REFERENCES

C.J.S. — 30 C.J.S., Eminent Domain, §§ 232, 233.

ALR. — Right of adjoining landowners

to intervene in condemnation proceedings on ground that they might suffer consequential damage, 61 ALR2d 1292.

22-3-4. Location of hearing before assessors; evidence upon which findings may be based.

The hearing may be conducted in the office of the judge of the probate court of the county in which the condemnation proceedings are had or at such other place as the assessors may fix. In assessing the damages to the railroad company, the assessors need not go upon or inspect the premises sought to be condemned, but they shall make their findings upon the testimony heard by them. (Ga. L. 1898, p. 54, § 1; Civil Code 1910, § 5239; Code 1933, § 36-704.)

JUDICIAL DECISIONS

Elements to be considered in determination of damages. — See *Atlantic C.L.R.R. v. Postal Telegraph-Cable Co.*, 120 Ga. 268, 48 S.E. 15, 1 Ann. Cas. 734 (1904); *Western & A.R.R. v. Western Union Tel. Co.*, 138 Ga. 420, 75 S.E. 471, 42 L.R.A. (n.s.) 225 (1912).

Measure of damages in condemnation case under this article is value of land actually taken, and the extent to which the value and use of the right of way by the railway company is diminished by its use by the telegraph company. *Atlantic C.L.R.R. v. Postal Telegraph-Cable Co.*, 120 Ga. 268, 48 S.E. 15, 1 Ann. Cas. 734 (1904).

Value of right of way for other uses cannot be considered. — In arriving at the value of the land actually appropriated, the general salable value of the right of way for other uses than that to which it is applied by the railway company cannot be considered;

the appropriation to public use amounts to a withdrawal of the right of way from any use except that which is necessary or ancillary to the operation of the railroad. *Atlantic C.L.R.R. v. Postal Telegraph-Cable Co.*, 120 Ga. 268, 48 S.E. 15, 1 Ann. Cas. 734 (1904).

Peculiar advantages of right of way not proper element of damages. — That the right of way may possess peculiar advantages and benefits to the telegraph company in the construction and maintenance of its line is not a proper element in the estimate of damages. *Atlantic C.L.R.R. v. Postal Telegraph-Cable Co.*, 120 Ga. 268, 48 S.E. 15, 1 Ann. Cas. 734 (1904).

Appeal from assessors' award under § 22-2-80 is permitted in a proceeding under this article. *Atlantic C.L.R.R. v. Postal Telegraph-Cable Co.*, 120 Ga. 268, 48 S.E. 15, 1 Ann. Cas. 734 (1904).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Eminent Domain, §§ 409, 419-442.

C.J.S. — 29A C.J.S., Eminent Domain, §§ 271-275. 30 C.J.S., Eminent Domain, §§ 296-298.

ALR. — Right of court to reduce or increase award in condemnation and confirm it as reduced or increased, 61 ALR 194.

Right to intervene in court review of zoning proceeding, 46 ALR2d 1059.

Right of adjoining landowners to intervene in condemnation proceedings on ground that they might suffer consequential damage, 61 ALR2d 1292.

Right to view by jury in condemnation proceedings, 77 ALR2d 548.

Liability, upon abandonment of eminent domain proceedings, for loss or expenses incurred by property owner, or for interest on award or judgment, 92 ALR2d 355.

ARTICLE 2

CONSTRUCTION AND OPERATION OF
ELECTRIC POWER PLANTS

JUDICIAL DECISIONS

Proceeding before special master available to private company. — A private company possessing the power of eminent domain is authorized to employ the con-

demnation procedure of Art. 2, Ch. 2, T. 2. *Nodvin v. Georgia Power Co.*, 125 Ga. App. 821, 189 S.E.2d 118 (1972).

RESEARCH REFERENCES

Am. Jur. 2d. — 26 Am. Jur. 2d, Eminent Domain, §§ 20, 56, 138. 27 Am. Jur. 2d, Eminent Domain, §§ 344, 345.

C.J.S. — 29A C.J.S., Eminent Domain, §§ 24, 46, 58, 89-93.

ALR. — Right to and measure of compensation to owner of fee when telegraph or telephone line is erected along railroad right of way or highway, 19 ALR 383.

Elements and measure of compensation for power lines or other wire lines over private property, 49 ALR 697; 124 ALR 407.

Limitation applicable to action or proceeding by owner for compensation where property is taken in exercise of eminent domain without antecedent condemnation proceeding, 123 ALR 676.

Condemnation of premises or part thereof as affecting rights of landlord and tenant inter se, 163 ALR 679.

Condemnor's waiver, surrender, or limitation, after award, of rights or part of property acquired by condemnation, 5 ALR2d 724.

Correlative rights of dominant and servient owners in right of way for electric line, 6 ALR2d 205.

Liability of water distributor for damage caused by water escaping from main, 20 ALR3d 1294.

Power of eminent domain as between state and subdivision or agency thereof, or as between different subdivisions or agencies themselves, 35 ALR3d 1293.

PART 1

GENERAL PROVISIONS

22-3-20. Power of persons operating, constructing, etc., electric plants to purchase, condemn, etc., rights of way and easements.

Any person operating or constructing or preparing to construct a plant for generating electricity shall have the right to purchase, lease, or condemn rights of way or other easements over the lands of others in order to run power lines, maintain dams, flow backwater, or carry or other activities necessary for constructing and operating such a plant provided that the person first pays just compensation to the owner of the land to be affected. (Ga. L. 1897, p. 68, § 1; Civil Code 1910, § 5240; Code 1933, § 36-801.)

Cross references. — As to granting of easements, rights of way, etc., to electric utilities for purposes of producing hydroelectric power from dam sites on property owned by governing authority of recreation system, see § 36-64-3.1.

JUDICIAL DECISIONS

This section is constitutional. *Jones v. North Ga. Elec. Co.*, 125 Ga. 618, 54 S.E. 85, 6 L.R.A. (n.s.) 122, 5 Ann. Cas. 526 (1906); *Nolan v. Central Ga. Power Co.*, 134 Ga. 201, 67 S.E. 656 (1910).

Section grants power of eminent domain to corporate utilities. — The power of eminent domain is inherent in the sovereign state, but lies dormant until granted by Act of the Legislature; under the provisions of this section, corporate utilities supplying electric power to the public have been granted the power of eminent domain. *Harwell v. Georgia Power Co.*, 154 Ga. App. 142, 267 S.E.2d 769 (1980).

This section limits interest in land which power company can condemn for electric distribution purposes. *B. & W. Hen Farm, Inc. v. Georgia Power Co.*, 222 Ga. 830, 152 S.E.2d 841 (1966).

This section confers no power to condemn undivided interest or easement in water-power the remainder of which is owned by the electric-light corporation which is seeking to condemn. *Oconee Elec. Light & Power Co. v. Carter*, 111 Ga. 106, 36 S.E. 457 (1900); *Nolan v. Central Ga. Power Co.*, 134 Ga. 201, 67 S.E. 656 (1910).

This section does not conflict with § 44-8-3, defining the rights of a riparian owner of a nonnavigable stream. *Nolan v. Central Ga. Power Co.*, 134 Ga. 201, 67 S.E. 656 (1910).

Determination of "public use". — Whether a purpose is a public or private purpose within the meaning of the law relating to eminent domain does not depend on use or the amount of use by the public, but upon the right of the public to such use. *Rogers v. Toccoa Elec. Power Co.*, 163 Ga. 919, 137 S.E. 272 (1927).

Foreign corporation domesticated in Georgia has right to condemn land. — A corporation chartered in another state with the right to own and operate an electric plant and engage in the business of generating, transmitting, and selling electricity for commercial and domestic use, and later domesticated in this state by appropriate proceedings, has the right to condemn the land of others for the purpose of running its lines or wires over the same and using and maintaining poles and appliances thereon in order to distribute electric current to the public from its plant. *Perry v. Folkston Power Co.*, 181 Ga. 527, 183 S.E. 58 (1935).

A foreign corporation owning or controlling water power in this state, when domesticated under the laws of Georgia, can exercise the right of eminent domain in this state for the purposes mentioned in this section. A foreign corporation without being so domesticated has no such right. *Head v. Rich*, 61 Ga. App. 293, 6 S.E.2d 73 (1939), *aff'd*, 190 Ga. 680, 10 S.E.2d 183 (1940) (decided under former Code 1933 § 22-1601).

De facto corporation cannot exercise eminent domain. — A power company that has become a de facto corporation cannot exercise the powers conferred by this section. *Rogers v. Toccoa Power Co.*, 161 Ga. 524, 131 S.E. 517, 44 A.L.R. 534 (1926).

Eminent domain power not lost through furnishing power in another state. — A corporation having the power of eminent domain under this section would not lose such power because it also furnished electric power in Tennessee. *Rogers v. Toccoa Elec. Power Co.*, 163 Ga. 919, 137 S.E. 272 (1927).

This section does not authorize power company to maintain nuisance. *Towaliga Falls Power Co. v. Sims*, 6 Ga. App. 749, 65 S.E. 844 (1909); *Central Ga. Power Co. v. Ham*, 139 Ga. 569, 77 S.E. 396 (1913).

Notice to owner required. — Preliminary to the exercise of the power granted by this section, for the purpose of erecting an electric line with necessary poles and fixtures, it is incumbent upon the power company to serve a notice on the owner of the property sought to be condemned, which notice shall describe the property with the same definiteness as is required in a deed of conveyance of land. *Gunn v. Georgia Power Co.*, 205 Ga. 85, 52 S.E.2d 449 (1949).

In proceeding under this section sole question for assessors is amount of compensation to be paid; the assessors cannot pass upon the legal power of the company to institute such proceedings. *Rogers v. Toccoa Power Co.*, 161 Ga. 524, 131 S.E. 517, 44 A.L.R. 534 (1926).

Injunction is proper remedy to determine power of eminent domain. The remedy of the landowner who seeks to challenge the legal power of a company to

condemn is to apply to a court of equity to enjoin the condemnation proceedings if they are unauthorized. *Rogers v. Toccoa Power Co.*, 161 Ga. 524, 131 S.E. 517, 44 A.L.R. 534 (1926).

And injunction is proper remedy for questioning legality of corporation's charter. *Rogers v. Toccoa Power Co.*, 161 Ga. 524, 131 S.E. 517, 44 A.L.R. 534 (1926).

Owner who permits appropriation of land estopped from ejectment or injunction. — If a landowner stands by and permits, without legal objection, a public utility company to appropriate his land to its necessary corporate use until such becomes a necessary and constituent part of its service to the public, and the rights of the public intervene to such extent that to oust the company would interrupt the service and deny it to the public, the landowner, not for the protection so much of the company but for the benefit of the public, will be estopped from recovering the land in ejectment from enjoining its use for the service, but will, if he moves in time, be remitted to an appropriate action for damages. *Wiggins v. Southern Bell Tel. & Tel. Co.*, 245 Ga. 526, 266 S.E.2d 148 (1980).

Damage to other property from power lines on right of way. — The power, telephone and telegraph companies all have the power of eminent domain, and could exercise that power to acquire the right to erect their lines upon the railroad's right of way. That they choose to acquire by contract such right, as against the railroad, does not render the railroad company liable for their alleged failure also to compensate the plaintiff for the taking or damaging of her property by their erection of power and communication lines on the railroad's right of way. *Tompkins v. Atlantic Coast Line R.R.*, 89 Ga. App. 171, 79 S.E.2d 41 (1953).

Cited in *Pye v. State Hwy. Dep't*, 226 Ga. 389, 175 S.E.2d 510 (1970); *Harwell v. Georgia Power Co.*, 246 Ga. 203, 269 S.E.2d 464 (1980); *Cox Enterprises, Inc. v. Carroll City/County Hosp. Auth.*, 247 Ga. 39, 273 S.E.2d 841 (1981).

RESEARCH REFERENCES

Am. Jur. 2d. — 26 Am. Jur. 2d, Eminent Domain, §§ 56, 132, 138, 150-152, 165, 195, 212. 27 Am. Jur. 2d, Eminent Domain, §§ 321-324, 344, 345, 350.

C.J.S. — 29A C.J.S., Eminent Domain, §§ 46, 58, 110-185, 195-205. 30 C.J.S., Eminent Domain, §§ 449-451. 73 C.J.S., Public Utilities, § 2.

ALR. — Furnishing electricity to public as public use or purpose for which power of eminent domain may be exercised, 44 ALR 735.

Compensation for, or extent of rights acquired by, taking of land, as affected by condemner's promissory statements as to character of use or undertakings to be performed by it, 7 ALR2d 364.

Admissibility, in eminent domain proceeding, of evidence as to price paid for condemned real property during pendency of the proceeding, 55 ALR2d 781.

Admissibility, in eminent domain proceeding, of evidence as to price paid for condemned real property on sale prior to the proceeding, 55 ALR2d 791.

Electric light or power line in street or highway as additional servitude, 58 ALR2d 525.

Right to condemn property in excess of needs for a particular public purpose, 6 ALR3d 297.

Eminent domain: right to enter land for preliminary survey or examination, 29 ALR3d 1104.

Eminent domain: determination of just compensation for condemnation of billboards or other advertising signs, 73 ALR3d 1122.

Good will as element of damages for condemnation of property on which private business is conducted, 81 ALR3d 198.

Applicability of zoning regulations to projects of nongovernmental public utility as affected by utility's having power of eminent domain, 87 ALR3d 1265.

Liability for overflow of water confined or diverted for public power purposes, 91 ALR3d 1065.

Eminent domain: right of owner of land not originally taken or purchased as part of adjacent project to recover, on enlargement of project to include adjacent land, enhanced value of property by reason of proximity to original land — state cases, 95 ALR3d 752.

Unsuitability of powerline or other wire, or related structure, as element of damages in easement condemnation proceeding, 97 ALR3d 587.

Eminent domain: recovery of value of improvements made with knowledge of impending condemnation, 98 ALR3d 504.

22-3-21. Payment of compensation or damages.

In fixing the compensation or damage for both actual and consequential damages, either or both shall be paid by the persons seeking to condemn property as provided in this article. (Ga. L. 1925, p. 272, § 1; Code 1933, § 36-802.)

RESEARCH REFERENCES

C.J.S. — 29A C.J.S., Eminent Domain, § 195.

ALR. — Unity or contiguity of properties essential to allowance of damages in eminent domain proceedings on account of remaining property, 6 ALR2d 1197.

Admissibility, in eminent domain proceeding, of evidence as to price paid for condemned real property during pendency of the proceeding, 55 ALR2d 781.

Admissibility, in eminent domain proceeding, of evidence as to price paid for

condemned real property on sale prior to the proceeding, 55 ALR2d 791.

Liability of water distributor for damage caused by water escaping from main, 20 ALR3d 1294.

Compensation for diminution in value of the remainder of property resulting from taking or use of adjoining land of others for the same undertaking, 59 ALR3d 488.

Eminent domain: consideration of fact that landowner's remaining land will be subject to special assessment in fixing severance damages, 59 ALR3d 534.

Good will as element of damages for condemnation of property on which private business is conducted, 81 ALR3d 198.

Liability for overflow of water confined

or diverted for public power purposes, 91 ALR3d 1065.

Eminent domain: right of owner of land not originally taken or purchased as part of adjacent project to recover, on enlargement of project to include adjacent land, enhanced value of property by reason of proximity to original land — state cases, 95 ALR3d 752.

Unsightliness of powerline or other wire, or related structure, as element of damages in easement condemnation proceeding, 97 ALR3d 587.

Eminent domain: recovery of value of improvements made with knowledge of impending condemnation, 98 ALR3d 504.

22-3-22. Condemnation of mills, factories, dams, etc.

Any person seeking to exercise the power of eminent domain under Code Section 22-3-20 shall have the right and authority to acquire by condemnation any mill, factory, dam, or other property or interest connected with same, except cotton mills or factories or any plant engaged in furnishing electric power to the public. (Civil Code 1910, § 5242; Ga. L. 1925, p. 272, § 3; Code 1933, § 36-812.)

JUDICIAL DECISIONS

Protection accorded to mills and factories under this section extends to appurtenances necessary to their operation, but not to property from which the crude material is taken for supplying such mill or factory. *Beuchler v. Georgia Ry. & Power Co.*, 139 Ga. 724, 78 S.E. 121 (1913); *Nolan v. Central Ga. Power Co.*, 134 Ga. 201, 67 S.E. 656 (1910).

And protection applies to mills and factories operated by steam power as well as to those operated by water power. *Stribbling v. Georgia Ry. & Power Co.*, 139 Ga. 676, 78 S.E. 42 (1913).

Cited in *Lewis v. Fidelity & Deposit Co.*, 292 U.S. 559, 54 S. Ct. 848, 78 L. Ed. 1425 (1934).

RESEARCH REFERENCES

C.J.S. — 29 C.J.S., Eminent Domain, §§ 71, 107, 114, 150, 162.

PART 2

ACQUISITION OF RIGHT TO FLOOD ROADS AND HIGHWAYS

22-3-40. “Public road” and “public highway” defined.

As used in this part, the term “public road” or “public highway” means not only roads and highways proper but bridges, culverts, and appurtenances as well. (Ga. L. 1927, p. 370, § 4; Code 1933, § 36-803.)

22-3-41. Power to acquire right to flood roads and highways.

Any person referred to in Code Section 22-3-20 shall have the right and authority to acquire by purchase or condemnation the right to flood private roads or highways. Any such person shall also have the right to acquire by condemnation the right to flood public roads or highways by paying to the state or county authorities having jurisdiction over the same the cost of locating, laying out, constructing, and opening other public roads or highways to replace the public roads or highways flooded or intended to be flooded and also by paying to the state and county authorities any other damages that may be the natural and probable consequence of such flooding. (Ga. L. 1925, p. 272, § 1; Code 1933, § 36-804.)

Cross references. — As to abandonment of public roads, see Ch. 7, T. 32.

RESEARCH REFERENCES

Am. Jur. 2d. — 26 Am. Jur. 2d, Eminent Domain, §§ 73, 74, 103, 150-152, 178. 27 Am. Jur. 2d, Eminent Domain, §§ 329, 344, 345, 350.

C.J.S. — 29A C.J.S., Eminent Domain, §§ 81, 110, 111, 122, 129, 148, 151, 153.

ALR. — Applicability of zoning regulations to projects of nongovernmental public utility as affected by utility's having power of eminent domain, 87 ALR3d 1265.

22-3-42. Notice of intention to condemn.

If a public road or highway for which condemnation is sought is a part of the state highway system or if jurisdiction or control of the road or highway has been taken over or assumed by the State Transportation Board or other state authority, the notice of intention to condemn shall be addressed to and served upon the commissioner of transportation. If the road or highway is under the supervision or control of county authorities, the notice of intention to condemn shall be addressed to and served upon the judge of the probate court or upon any county commis-

sioner or such other officer as is by law vested with jurisdiction over and control of the public roads of the county in which the road to be condemned is located. (Ga. L. 1927, p. 370, § 4; Code 1933, § 36-808.)

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Eminent Domain, §§ 393, 394.

C.J.S. — 29A C.J.S., Eminent Domain, §§ 242-249.

22-3-43. Condemnation procedure; authorization of officers to act for state or county.

The procedure in the condemnation of public roads and highways shall be the same as provided by Chapter 2 of this title insofar as the procedures described in that chapter are not in conflict with this part. The public officer or officers to be notified and served as provided in Code Section 22-3-42 shall act for and in behalf of the state or county, as the case may be, in the appointment of an assessor and in all other respects as provided in Chapter 2 of this title with respect to the owner of the property or interest sought to be condemned. (Ga. L. 1927, p. 370, § 4; Code 1933, § 36-809.)

RESEARCH REFERENCES

ALR. — Right to intervene in court review of zoning proceeding, 46 ALR2d 1059.

intervene in condemnation proceedings on ground that they might suffer consequential damage, 61 ALR2d 1292.

Right of adjoining landowners to

22-3-44. Appeal to superior court.

Within 30 days after the award of condemnation is made pursuant to Part 4 of Article 1 of Chapter 2 of this title or pursuant to Article 2 of Chapter 2 of this title, any party may appeal to the superior court of the county in which the public roads or highways lie by filing with the judge of the probate court of the county a written notice of appeal. Within ten days after his receipt of the notice, the judge shall transmit the notice to the superior court. The trial on such an appeal shall be de novo. (Ga. L. 1925, p. 272, § 1; Code 1933, § 36-805.)

JUDICIAL DECISIONS

Cited in *Hinton v. Georgia Power Co.*, 126 Ga. App. 416, 190 S.E.2d 811 (1972); *Brown v. Techdata Corp.*, 238 Ga. 622, 234 S.E.2d 787 (1977).

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Appeal and Error, §§ 146, 188. 27 Am. Jur. 2d, Eminent Domain, §§ 468-472.

C.J.S. — 30 C.J.S., Eminent Domain, §§ 343, 344, 352-354, 372.

ALR. — Right of court to reduce or increase award in condemnation and confirm it as reduced or increased, 61 ALR 194.

Right to intervene in court review of

zoning proceeding, 46 ALR2d 1059.

Right of adjoining landowners to intervene in condemnation proceedings on ground that they might suffer consequential damage, 61 ALR2d 1292.

Liability, upon abandonment of eminent domain proceedings, for loss or expenses incurred by property owner, or for interest on award or judgment, 92 ALR2d 355.

22-3-45. Rights of condemnor pending appeal.

Upon the condemnor's paying the sum fixed by the assessor's award to the state or county authorities together with the cost of proceedings pending an appeal pursuant to Code Section 22-3-44 and upon the execution of a bond in double the amount of the award so fixed, with good and sufficient surety to pay the eventual condemnation award, the condemnor shall be entitled to flood the public roads or highways which are made the subject of the proceedings, provided that such right shall not vest absolutely in the condemnor until the final determination of the case and the payment or deposit in court of the final condemnation award. (Ga. L. 1925, p. 272, § 1; Code 1933, § 36-806.)

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Eminent Domain, § 469.

C.J.S. — 29A C.J.S., Eminent Domain,

§§ 186-194, 221, 227. 30 C.J.S., Eminent Domain, §§ 355, 449-452.

22-3-46. Restrictions on use of condemned road or highway by condemnor.

Before any public road or highway condemned under this part may be used by the condemnor, any new road or highway to be constructed pursuant to Code Section 22-3-41, including any and all bridges and culverts that may be necessary as a part thereof, shall be laid out, constructed, and made ready for public use by the condemnor. All of this new construction shall first be approved by the authorities having control

of the condemned road or highway. (Ga. L. 1927, p. 370, § 4; Code 1933, § 36-810.)

RESEARCH REFERENCES

Am. Jur. 2d. — 26 Am. Jur. 2d, Eminent Domain, § 72.

22-3-47. Effect of part on rights of action of property owners and public utilities.

This part shall not be construed as taking away or in any way prejudicing any right of action possessed by a property owner or a public utility for damages to property caused by the closing of any public road or highway under this part. (Ga. L. 1925, p. 272, § 1; Code 1933, § 36-807.)

RESEARCH REFERENCES

ALR. — Liability of water distributor for damage caused by water escaping from main, 20 ALR3d 1294.

Liability for overflow of water confined or diverted for public power purposes, 91 ALR3d 1065.

ARTICLE 3

CONSTRUCTION AND OPERATION OF WATERWORKS

RESEARCH REFERENCES

C.J.S. — 29A C.J.S., Eminent Domain, §§ 24, 45, 89-93.

ALR. — Right to and measure of compensation to owner of fee when telegraph or telephone line is erected along railroad right of way or highway, 19 ALR 383.

Limitation applicable to action or proceeding by owner for compensation where property is taken in exercise of eminent domain without antecedent condemnation proceeding, 123 ALR 676.

Condemnation of premises or part thereof as affecting rights of landlord and tenant inter se, 163 ALR 679.

Condemnor's waiver, surrender, or limitation, after award, of rights or part of property acquired by condemnation, 5 ALR2d 724.

Power of eminent domain as between state and subdivision or agency thereof, or as between different subdivisions or agencies themselves, 35 ALR3d 1293.

22-3-60. Persons constructing, operating, etc., waterworks authorized to lease, purchase, condemn, etc., property or interests.

Any person constructing, owning, or operating any waterworks in this state shall have the right, power, privilege, and authority to lease, purchase, or condemn property or any interest therein, including easements, or to receive donations or grants of property or any interest therein, including easements, for the purpose of constructing and operating waterworks. (Ga. L. 1889, p. 184, § 1; Civil Code 1895, § 2407; Civil Code 1910, § 2923; Code 1933, § 36-901.)

Cross references. — As to authority of municipal corporations to exercise power of eminent domain for purposes of con-

structing, extending, etc., water systems and sewage systems, see § 36-34-5.

JUDICIAL DECISIONS

Company holding franchise and having eminent domain power owes public duty.

— A company which holds a franchise to conduct the business of furnishing water to a city and its inhabitants and which has the power of eminent domain under this sec-

tion is a public service corporation, and owes a public duty to the city's inhabitants. *Washington Water & Elec. Co. v. Pope Mfg. Co.*, 176 Ga. 155, 167 S.E. 286 (1932).

Cited in *Pye v. State Hwy. Dep't*, 226 Ga. 389, 175 S.E.2d 510 (1970).

RESEARCH REFERENCES

Am. Jur. 2d. — 26 Am. Jur. 2d, Eminent Domain, §§ 20, 59, 141. 27 Am. Jur. 2d, Eminent Domain, § 349. 78 Am. Jur. 2d, Waterworks and Water Companies, § 9.

C.J.S. — 29A C.J.S., Eminent Domain, §§ 45, 65-86. 73 C.J.S., Public Utilities, § 2.

ALR. — Compensation for, or extent of rights acquired by, taking of land, as affected by condemner's promissory statements as to character of use or undertakings to be performed by it, 7 ALR2d 364.

Admissibility, in eminent domain proceeding, of evidence as to price paid for condemned real property during pendency of the proceeding, 55 ALR2d 781.

Admissibility, in eminent domain proceeding, of evidence as to price paid for condemned real property on sale prior to the proceeding, 55 ALR2d 791.

Right to condemn property in excess of needs for a particular public purpose, 6 ALR3d 297.

Eminent domain: right to enter land for preliminary survey or examination, 29 ALR3d 1104.

Applicability of zoning regulations to projects of nongovernmental public utility as affected by utility's having power of eminent domain, 87 ALR3d 1265.

22-3-61. Condemnation procedure.

If a person seeking to exercise the power of eminent domain under this article fails to procure, by contract, title to the land necessary or proper for the construction and successful operation of waterworks and the parties cannot agree upon the damage done, the same shall be assessed

as provided in Chapter 2 of this title. (Ga. L. 1889, p. 184, § 2; Civil Code 1895, § 2408; Civil Code 1910, § 2924; Code 1933, § 36-902.)

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Eminent Domain, §§ 387-389, 409, 427-442.

C.J.S. — 29A C.J.S., Eminent Domain, §§ 136-185, 218-221, 224. 30 C.J.S., Eminent Domain, §§ 271-275, 292-304.

ALR. — Admissibility, in eminent domain proceeding, of evidence as to price paid for condemned real property during pendency of the proceeding, 55 ALR2d 781.

Admissibility, in eminent domain proceeding, of evidence as to price paid for condemned real property on sale prior to the proceeding, 55 ALR2d 791.

Eminent domain: recovery of value of improvements made with knowledge of impending condemnation, 98 ALR3d 504.

22-3-62. Applicability of article.

The powers granted by this article shall apply only to those persons who have entered into a contract with the proper authorities for supplying water for public purposes. (Ga. L. 1889, p. 184, § 3; Civil Code 1895, § 2409; Civil Code 1910, § 2925; Code 1933, § 36-903.)

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Eminent Domain, § 386.

C.J.S. — 29A C.J.S., Eminent Domain, § 225.

ARTICLE 4

CONSTRUCTION, OPERATION, ETC., OF PETROLEUM PIPELINES AND GAS PIPELINES

Law reviews. — For comment on Benton v. State Hwy. Dep't, 111 Ga. App. 861, 143

S.E.2d 396 (1965), see 3 Ga. St. B.J. 107 (1966).

JUDICIAL DECISIONS

There is no express or implied requirement that natural gas pipeline company obtain certificate prior to instituting condemnation proceedings, and 15 U.S.C. § 717f(h), conferring power of eminent domain, does not superimpose

the prerequisite of a certificate on the Georgia law. *Robinson v. Transcontinental Gas Pipe Line Corp.*, 306 F. Supp. 201 (N.D. Ga. 1969), aff'd, 421 F.2d 1397 (5th Cir.), cert. denied, 398 U.S. 905, 90 S. Ct. 1695, 26 L. Ed. 2d 64 (1970).

OPINIONS OF THE ATTORNEY GENERAL

Authority granted to corporations by this article. — Corporations engaged in constructing, running or operating petroleum pipe lines in Georgia as common carriers in interstate or intrastate commerce have the power of eminent domain; while such pipe lines shall operate under the rules and regulations of the Public Service Commission, this article is not a gen-

eral regulatory Act as to petroleum pipe lines. The commission has not been vested by any specific law with any such regulatory powers. For this reason the commission could not even regulate intrastate pipe lines without additional authority being given to it by the General Assembly. 1957 Op. Att'y Gen. p. 220.

RESEARCH REFERENCES

ALR. — Limitation applicable to action or proceeding by owner for compensation where property is taken in exercise of eminent domain without antecedent condemnation proceeding, 123 ALR 676.

Condemnation of premises or part thereof as affecting rights of landlord and tenant inter se, 163 ALR 679.

Condemnor's waiver, surrender, or limitation, after award, of rights or part of property acquired by condemnation, 5 ALR2d 724.

Correlative rights of dominant and servient owners in right of way for pipeline, 28 ALR2d 626.

Eminent domain: elements and measure of compensation for oil or gas pipeline through private property, 38 ALR2d 788.

Liability of one maintaining pipeline for transportation of gas or other dangerous substances for injury or property damage sustained by one using surface, 30 ALR3d 685.

Power of eminent domain as between state and subdivision or agency thereof, or as between different subdivisions or agencies themselves, 35 ALR3d 1293.

22-3-80. Power of corporations constructing, operating, etc., petroleum pipelines to condemn property and interests owned by subdivisions of the state.

(a) Any corporation engaged in constructing, running, or operating pipelines in this state as a common carrier in interstate or intrastate commerce for the transportation of petroleum and petroleum products shall have the right of eminent domain. Any property or interest condemned pursuant to this Code section shall be deemed to have been condemned for public purposes.

(b) Any corporation engaged in constructing, running, or operating pipelines in this state for the transportation of petroleum products shall have the right to traverse with pipelines any property or interest owned by any subdivision of the state, including, without limiting the generality of the foregoing, any property or interest owned by municipalities, counties, or other subdivisions of the state, but not including agencies, departments, boards, bureaus, commissions, or authorities of the state.

(c) The rights granted by this Code section shall be exercised only to the extent necessary for the purposes designated in this Code section. (Ga. L. 1943, p. 1662, § 1; Ga. L. 1981, p. 789, §§ 1, 2.)

JUDICIAL DECISIONS

Cited in *Pye v. State Hwy. Dep't*, 226 Ga. 389, 175 S.E.2d 510 (1970).

RESEARCH REFERENCES

Am. Jur. 2d. — 26 Am. Jur. 2d, Eminent Domain, §§ 20, 55, 74, 90, 141, 178.

C.J.S. — 29A C.J.S., Eminent Domain, §§ 24, 255, 256. 30 C.J.S., Eminent Domain, § 450. 73 C.J.S., Public Utilities, § 2.

ALR. — Compensation for, or extent of rights acquired by, taking of land, as affected by condemner's promissory statements as to character of use or undertakings to be performed by it, 7 ALR2d 364.

Admissibility, in eminent domain proceeding, of evidence as to price paid for condemned real property during

pendency of the proceeding, 55 ALR2d 781.

Admissibility, in eminent domain proceeding, of evidence as to price paid for condemned real property on sale prior to the proceeding, 55 ALR2d 791.

Right to condemn property in excess of needs for a particular public purpose, 6 ALR3d 297.

Eminent domain: right to enter land for preliminary survey or examination, 29 ALR3d 1104.

Eminent domain: recovery of value of improvements made with knowledge of impending condemnation, 98 ALR3d 504.

22-3-81. Traversing of streets, watercourses, etc., for pipeline purposes.

Streets, roads, highways, streams, watercourses, or channels, including those owned by or under the jurisdiction of municipalities, counties, or other subdivisions of the state, may be traversed for the purposes designated in Code Section 22-3-80, provided that any traversing of any state highway shall be done under reasonable regulations promulgated by the Department of Transportation; provided, further, that any traversing of a county road or municipal street shall be done under reasonable regulations promulgated by the governing authority having jurisdiction over such road or street; provided, further, that any traversing of any other public property shall be done under such reasonable regulations as shall be promulgated by the authority having jurisdiction over such other public property. (Ga. L. 1943, p. 1662, § 2; Ga. L. 1981, p. 789, § 2.)

RESEARCH REFERENCES

Am. Jur. 2d. — 26 Am. Jur. 2d, Eminent Domain, §§ 90, 103, 114, 178. 27 Am. Jur. 2d, Eminent Domain, § 329.

C.J.S. — 28 C.J.S., Easements, §§ 5, 35. 30 C.J.S., Eminent Domain, § 449 et seq.

22-3-82. Description of corporations authorized to exercise powers under Code Sections 22-3-80 and 22-3-81.

The powers described in Code Sections 22-3-80 and 22-3-81 may be exercised by those corporations which are organized under the laws of this state, or which are organized under the laws of another state and are authorized to do business in this state, and which are authorized by their charters or articles of incorporation to construct and operate pipelines for the transportation of petroleum and petroleum products, provided that such pipelines are operated as common carriers under such rules and regulations of the Public Service Commission as may apply to them and similar utilities. (Ga. L. 1943, p. 1662, § 3.)

RESEARCH REFERENCES

Am. Jur. 2d. — 29A Am. Jur. 2d, Eminent Domain, § 24.

ALR. — Federal control of public utilities, 19 ALR 678.

22-3-83. Authority of persons constructing or operating gas pipelines or furnishing gas for heating, lighting, etc., purposes to exercise power of eminent domain.

The power of eminent domain may be exercised by persons who are or may be engaged in constructing or operating pipelines for the transportation or distribution of natural or artificial gas and by persons who are or may be engaged in furnishing natural or artificial gas for heating, lighting, or power purposes in the State of Georgia. (Ga. L. 1929, p. 219, § 1.)

Cross references. — As to regulation of intrastate gas pipelines and distribution systems, see § 46-4-20 et seq. For further

provisions regarding exercise of power of eminent domain by gas utilities, see § 46-4-57.

JUDICIAL DECISIONS

This section is grant of state power of eminent domain, separate and distinct from the federal power of eminent domain as granted under the Natural Gas Act, 15 U.S.C.A. § 717f(h). *Robinson v. Transcontinental Gas Pipe Line Corp.*, 421 F.2d 1397 (5th Cir. 1970), cert. denied, 398 U.S. 905, 90 S. Ct. 1695, 26 L. Ed. 2d 64 (1970).

And this section is concurrent with federal right of eminent domain. *Robinson v. Transcontinental Gas Pipe*

Line Corp., 306 F. Supp. 201 (N.D. Ga. 1969), aff'd, 421 F.2d 1397 (5th Cir.), cert. denied, 398 U.S. 905, 90 S. Ct. 1695, 26 L. Ed. 2d 64 (1970).

Certificate of public convenience and necessity is not required by this section. *Robinson v. Transcontinental Gas Pipe Line Corp.*, 421 F.2d 1397 (5th Cir. 1970), cert. denied, 398 U.S. 905, 90 S. Ct. 1695, 26 L. Ed. 2d 64 (1970).

Reference to telephone and telegraph lines in natural gas company's condemna-

tion notice. — The construction and operation of telephone or telegraph lines would seem to be entirely foreign to the use for which the plaintiff natural gas company is authorized to condemn the property of others, and the reference to telephone and

telegraph lines as contained in a notice of the intended condemnation must be treated as surplusage. *H. G. Hastings Co. v. Southern Natural Gas Corp.*, 45 Ga. App. 774, 166 S.E. 56 (1932).

RESEARCH REFERENCES

ALR. — Limitation applicable to action or proceeding by owner for compensation where property is taken in exercise of eminent domain without antecedent condemnation proceeding, 123 ALR 676.
Condemnation of premises or part thereof as affecting rights of landlord and tenant inter se, 163 ALR 679.
Condemnor's waiver, surrender, or limitation, after award, of rights or part of property acquired by condemnation, 5 ALR2d 724.
Correlative rights of dominant and servient owners in right of way for pipeline, 28 ALR2d 626.

Admissibility, in eminent domain proceeding, of evidence as to price paid for condemned real property during pendency of the proceeding, 55 ALR2d 781.
Admissibility, in eminent domain proceeding, of evidence as to price paid for condemned real property on sale prior to the proceeding, 55 ALR2d 791.
Eminent domain: right to enter land for preliminary survey or examination, 29 ALR3d 1104.
Eminent domain: recovery of value of improvements made with knowledge of impending condemnation, 98 ALR3d 504.

ARTICLE 5

CONSTRUCTION, OPERATION, ETC., OF WATERSHED
PROJECTS, FLOOD-CONTROL PROJECTS,
ETC., BY COUNTIES

OPINIONS OF THE ATTORNEY GENERAL

Counties may request federal administration of construction contracts under 16 U.S.C.A. § 1001 et seq. if such request is

first approved by the State Soil and Water Conservation Committee. 1969 Op. Att'y Gen. No. 69-344.

RESEARCH REFERENCES

ALR. — Limitation applicable to action or proceeding by owner for compensation where property is taken in exercise of eminent domain without antecedent condemnation proceeding, 123 ALR 676.
Condemnation of premises or part

thereof as affecting rights of landlord and tenant inter se, 163 ALR 679.
Power of eminent domain as between state and subdivision or agency thereof, or as between different subdivisions or agencies themselves, 35 ALR3d 1293.

22-3-100. Authority of counties to exercise power of eminent domain.

Every county of the State of Georgia may exercise the power of eminent domain for the purpose of taking and acquiring the property or other interests necessary:

(1) To enable the county to institute and to accomplish the completion of small watershed projects, works of improvements for watersheds, and projects for watershed protection and flood control and prevention under any applicable Act of the State of Georgia or act of the United States;

(2) For certain public parks, playgrounds, recreation centers, or other recreational facilities to be developed in connection with the development or construction of any small watershed project, any project for watershed protection or flood control and prevention, or works of improvements for watersheds; and

(3) To allow for ways of ingress to and egress from any and all such watershed projects, improvements of watershed projects, projects for watershed protection and flood control and prevention, and public parks, playgrounds, recreation centers, or other recreational facilities. (Ga. L. 1964, p. 234, §§ 1-3.)

Cross references. — As to granting of easements, rights of way, etc., to electric utilities for purposes of producing

hydroelectric power from dam sites on property owned by governing authority of recreation system, see § 36-64-3.1.

JUDICIAL DECISIONS

Property not used for purpose for which it was originally condemned may be devoted to another proper public use. Galloway v. Board of Comm'rs, 246 Ga. 472, 271 S.E.2d 784 (1980).

Where a local governing authority has, in good faith, condemned property in fee simple for a public use, the condemnor, without the necessity for bringing another condemnation proceeding, may abandon the specific use for which the property was taken and devote the property to another public use. Galloway v. Board of Comm'rs, 246 Ga. 472, 271 S.E.2d 784 (1980).

And title to condemned property does not revert to original owner. — Where a

governing body condemns lands in fee simple, the failure to use the lands for the purpose for which they were condemned does not cause title to revert to the original owners. Galloway v. Board of Comm'rs, 246 Ga. 472, 271 S.E.2d 784 (1980).

Use of lakes on condemned property for recreation is proper. — The very existence of paragraph (2) of this section illustrates that where property condemned for watershed projects and flood control is not ultimately used for these purposes, using lakes on the property as public recreational facilities is a proper, alternative public use. Galloway v. Board of Comm'rs, 246 Ga. 472, 271 S.E.2d 784 (1980).

OPINIONS OF THE ATTORNEY GENERAL

Intent of words "recreational centers or other recreational facilities, to be developed in connection with . . ." is that a proposed facility, which may be used for recreational purposes, must also have substantial, tangible watershed or flood control benefits. 1967 Op. Att'y Gen. No. 67-274.

Condemnation where project cosponsored by conservation district and county. — With respect to a small watershed project instituted under the cosponsorship of a soil and water conservation district and a county or counties either the district or the counties may condemn property for the project in compliance with the pertinent statutes. 1967 Op. Att'y Gen. No. 67-108.

No requirement that appraised amount be placed in trust prior to ruling. — It is not necessary for the agency bringing condemnation proceedings to place any appraised amount in trust prior to a court ruling; however, if assessors are appointed as provided in § 22-2-135, the condemning authority cannot appeal the assessors' award without tender of the amount of the award to the condemnee or payment into the registry of the court; also the full sum awarded in any condemnation proceeding must be tendered to the condemnee, or paid into court in the event the condemnee refuses to accept payment, before the condemnor may enter upon, occupy, or subject the land to its use. 1967 Op. Att'y Gen. No. 67-108.

RESEARCH REFERENCES

Am. Jur. 2d. — 26 Am. Jur. 2d, Eminent Domain, §§ 19, 26, 60, 65, 85, 128, 132, 140, 141, 165, 196. 27 Am. Jur. 2d, Eminent Domain, §§ 323, 349, 350. 50 Am. Jur. 2d, Levees and Flood Control, § 8.

C.J.S. — 28 C.J.S., Easements, §§ 5, 35. 29A C.J.S., Eminent Domain, §§ 21, 23, 30, 63, 64, 65, 105, 117, 151, 212. 30 C.J.S., Eminent Domain, § 450.

ALR. — Compensation for, or extent of rights acquired by, taking of land, as affected by condemner's promissory statements as to character of use or undertakings to be performed by it, 7 ALR2d 364.

Admissibility, in eminent domain proceeding, of evidence as to price paid for condemned real property during pendency of the proceeding, 55 ALR2d 781.

Admissibility, in eminent domain proceeding, of evidence as to price paid for condemned real property on sale prior to the proceeding, 55 ALR2d 791.

Right to condemn property in excess of needs for a particular public purpose, 6 ALR3d 297.

Eminent domain: right to enter land for preliminary survey or examination, 29 ALR3d 1104.

Eminent domain: right of owner of land not originally taken or purchased as part of adjacent project to recover, on enlargement of project to include adjacent land, enhanced value of property by reason of proximity to original land — state cases, 95 ALR3d 752.

Eminent domain: recovery of value of improvements made with knowledge of impending condemnation, 98 ALR3d 504.

22-3-101. Condemnation procedure.

For the purposes designated in Code Section 22-3-100, every county of the State of Georgia may proceed to condemn the necessary property or other interest in accordance with the procedures set forth by the pertinent eminent domain statutes of this state and in accordance with all existing laws applicable to the condemnation of private property for

public use, including Article 2 of Chapter 2 of this title. (Ga. L. 1964, p. 234, § 4.)

RESEARCH REFERENCES

ALR. — Right to intervene in court review of zoning proceeding, 46 ALR2d 1059.

Right of adjoining landowners to intervene in condemnation proceedings on ground that they might suffer consequen-

tial damage, 61 ALR2d 1292.

Liability, upon abandonment of eminent domain proceedings, for loss or expenses incurred by property owner, or for interest on award or judgment, 92 ALR2d 355.

22-3-102. Requirement of condemnation of fee simple title to land to be flooded permanently.

In any proceeding under this article, the condemnor shall be required to condemn the fee simple title to all land not otherwise acquired which will be covered by permanent flooding. (Ga. L. 1964, p. 234, § 5.)

RESEARCH REFERENCES

Am. Jur. 2d. — 26 Am. Jur. 2d, Eminent Domain, §§ 130-132, 192, 195, 196. 27 Am. Jur. 2d, Eminent Domain, § 350.

C.J.S. — 30 C.J.S., Eminent Domain, § 450.

ARTICLE 6

CONSTRUCTION OF LIGHTHOUSES, BEACONS, ETC., BY UNITED STATES GOVERNMENT

Cross references. — As to authority of Department of Transportation to exercise power of eminent domain for construction

and maintenance of intracoastal waterway, see § 52-3-5.

RESEARCH REFERENCES

ALR. — Power of eminent domain as exercisable by state or one of its political subdivisions for benefit of federal govern-

ment, or by federal government exclusively under state authority, 143 ALR 1040.

22-3-120. Condemnation for construction of lighthouses, beacons, etc.

In any county in which the United States government authorizes the construction of lighthouses, beacons, range lights, or any other structure designed to assist the navigation of the waters of this state, any proper

agency of the United States and the mayor of any city in that county shall mark out, by metes and bounds, the property necessary to be taken and shall convey to the owner of the property or of any interest therein notice of the planned construction. If the agency of the United States and the owner cannot agree on the compensation to be paid for taking the land, the Governor shall appoint one person and the owner of the land another; and these two shall select a third person. The three persons so selected shall constitute a commission to assess the just and adequate compensation to be paid according to the general method of condemning land provided in Article 1 of Chapter 2 of this title. (Ga. L. 1882-83, p. 118, § 1; Civil Code 1895, § 26; Civil Code 1910, § 27; Code 1933, § 36-1101.)

JUDICIAL DECISIONS

This section does not require condemning authority to make effort to purchase by private contract as a condition precedent to the institution of condemnation proceedings thereunder. *Varnadoe v. Housing Auth.*, 221 Ga. 467, 145 S.E.2d 493 (1965).

Selection of what and how much prop-

erty will be taken for a needed public use by a condemning authority will not be interfered with or controlled by the courts unless such selection is made in bad faith or beyond the power conferred by law. *Varnadoe v. Housing Auth.*, 221 Ga. 467, 145 S.E.2d 493 (1965).

RESEARCH REFERENCES

Am. Jur. 2d. — 26 Am. Jur. 2d, Eminent Domain, §§ 10-12, 41, 53, 118. 27 Am. Jur. 2d, Eminent Domain, §§ 409, 427-442.

C.J.S. — 29A C.J.S., Eminent Domain, §§ 18, 23, 49, 62, 64, 224. 30 C.J.S., Eminent Domain, §§ 271-278, 292-305.

ALR. — Compensation for, or extent of rights acquired by, taking of land, as affected by condemner's promissory statements as to character of use or undertakings to be performed by it, 7 ALR2d 364.

Admissibility, in eminent domain proceeding, of evidence as to price paid for condemned real property during

pendency of the proceeding, 55 ALR2d 781.

Admissibility, in eminent domain proceeding, of evidence as to price paid for condemned real property on sale prior to the proceeding, 55 ALR2d 791.

Right to condemn property in excess of needs for a particular public purpose, 6 ALR3d 297.

Eminent domain: right to enter land for preliminary survey or examination, 29 ALR3d 1104.

Eminent domain: recovery of value of improvements made with knowledge of impending condemnation, 98 ALR3d 504.

22-3-121. Acquisition of right to enter lands and clear or cut timber for purposes of carrying out survey of coasts — Generally.

Any person employed under the act of the Congress of the United States providing for a survey of the coasts may enter upon lands within this state and clear or cut timber upon the same for any purpose legiti-

mately connected with and necessary to carry out the survey, provided that no unnecessary injury be done thereby and all damages to the owner of the land be promptly paid. (Laws 1847, Cobb's 1851 Digest, p. 155; Code 1863, § 25; Code 1868, § 23; Code 1873, § 23; Code 1882, § 23; Civil Code 1895, § 27; Civil Code 1910, § 28; Code 1933, § 36-1102.)

U.S. Code. — The federal Act referred to in this section is codified at 33 U.S.C.A. § 883a, which provides for the activities

which the director of the Coast and Geodetic Survey is authorized to conduct.

RESEARCH REFERENCES

Am. Jur. 2d. — 26 Am. Jur. 2d, Eminent Domain, §§ 41, 73, 109, 173. 27 Am. Jur. 2d, Eminent Domain, § 269.

C.J.S. — 29A C.J.S., Eminent Domain, §§ 27, 62, 64, 67, 104, 110-112, 128, 173, 195-205.

22-3-122. Same — Manner of assessment where parties cannot agree on compensation.

If the parties representing the government of the United States and the owner of the property or of any interest therein pursuant to Code Section 22-3-121 cannot agree upon the amount of compensation to be paid for the property, the damages shall be assessed as provided in this title. (Laws 1847, Cobb's 1851 Digest, p. 155; Code 1863, § 26; Code 1868, § 24; Code 1873, § 24; Code 1882, § 24; Civil Code 1895, § 28; Civil Code 1910, § 29; Code 1933, § 36-1103.)

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Eminent Domain, §§ 266-296, 310-320, 409, 421, 427-442.

C.J.S. — 29A C.J.S., Eminent Domain, §§ 224, 276-278, 292-305.

ALR. — Admissibility, in eminent domain proceeding, of evidence as to price paid for condemned real property during pendency of the proceeding, 55 ALR2d 781.

Admissibility, in eminent domain proceeding, of evidence as to price paid for condemned real property on sale prior to the proceeding, 55 ALR2d 791.

Good will as element of damages for condemnation of property on which private

business is conducted, 81 ALR3d 198.

Eminent domain: right of owner of land not originally taken or purchased as part of adjacent project to recover, on enlargement of project to include adjacent land, enhanced value of property by reason of proximity to original land — state cases, 95 ALR3d 752.

Un sightliness of powerline or other wire, or related structure, as element of damages in easement condemnation proceeding, 97 ALR3d 587.

Eminent domain: recovery of value of improvements made with knowledge of impending condemnation, 98 ALR3d 504.

CHAPTER 4

RELOCATION OF PERSONS, BUSINESSES, ETC., DIS-
PLACED BY FEDERAL-AID PUBLIC WORKS
PROJECTS

Sec.	Sec.
22-4-1. Short title.	agencies, etc., in acquiring prop- erty for federal-aid public works projects — Generally.
22-4-2. Legislative findings and decla- ration of necessity.	22-4-10. Same — Acquisition of buildings, structures, and other improve- ments.
22-4-3. Applicability of Code Section 22-1-1 to chapter.	22-4-11. Adoption of rules by state, public agencies, etc.; appeal and review.
22-4-4. Payments by state, public agencies, etc., for relocation and placement housing expenses.	22-4-11.1. Exercise by municipal corpora- tions with population of 400,000 or more of powers granted under this chapter; effect of this Code section on other laws.
22-4-5. Providing of relocation assistance advisory services by state, public agencies, etc.	22-4-12. Functions provided in chapter as public purposes; effect of chapter on power of state, public agencies, etc., to tax.
22-4-6. Payments by state, public agencies, etc., for expenses inci- dental to property transfer, for mortgage penalties, and for prop- erty taxes.	22-4-13. Payments under chapter as income or resources.
22-4-7. Payments by state, public agencies, etc., for litigation expenses — Condemnation pro- ceedings.	22-4-14. Effect of chapter on condemna- tion proceedings.
22-4-8. Same — Inverse condemnation proceedings.	
22-4-9. Policies to guide state, public	

Cross references. — See Ga. Const. 1976, Art. I, Sec. III, Para. I. As to housing generally, see Ch. 3, T. 8. As to clearance, rehabilitation, etc., of blighted areas, see Ch. 4, T. 8. As to relocation assistance for individuals, businesses, etc., displaced by federal-aid and state-aid highway projects, see Ch. 8, T. 32.

22-4-1. Short title.

This chapter shall be known as “The Georgia Relocation Assistance and Land Acquisition Policy Act of 1973.” (Ga. L. 1973, p. 512, § 1.)

JUDICIAL DECISIONS

Cited in DeKalb County v. United Family Life Ins. Co., 235 Ga. 417, 219 S.E.2d 707 (1975); Department of Transp. v. Doss, 238 Ga. 480, 233 S.E.2d 144 (1977); City of Atlanta v. Rosebush, 146 Ga. App. 99, 245 S.E.2d 440 (1978).

22-4-2. Legislative findings and declaration of necessity.

The General Assembly finds and declares that the prompt and equitable relocation and reestablishment of persons, businesses, farmers, and nonprofit organizations displaced when the state, any of its agencies or institutions (other than the Department of Transportation), or any county, municipal corporation, school district, political subdivision, public authority, public agency, public corporation, or public instrumentality (collectively referred to in this chapter as "several public entities") created under the Constitution and laws of the State of Georgia acquires land, with federal financial assistance, for a public use, is necessary to insure that certain individuals do not suffer disproportionate injuries as a result of programs designed for the benefit of the public as a whole. The General Assembly finds and declares that the establishment of uniform fair land acquisition policies will be beneficial to the public. The General Assembly finds that the Congress of the United States has, by enacting the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, Public Law 91-646, Ninety-first Congress, approved January 2, 1971, made funds available for relocation assistance and the implementation of certain land acquisition policies. The General Assembly further finds that the Congress of the United States has by the aforesaid statute provided for the total cessation after July 1, 1972, of federal financial assistance for public works projects which will displace persons or businesses unless the state complies with the requirements of Public Law 91-646. The General Assembly finds and declares that the construction of public works projects with federal financial assistance is vital to the state and is in the best interest of the people of the state and that providing for the continuation of federal financial assistance at the highest possible level for public works projects is a legitimate public purpose. The General Assembly further finds that the cost of providing the assistance and services provided for in this chapter should be, and the same are declared to be, part of the necessary cost of federal-aid public works projects. (Ga. L. 1973, p. 512, § 2.)

Cross references. — As to federal financial aid for rehabilitation and redevelopment of blighted areas, see § 8-4-10.

U.S. Code. — Public Law 91-646, referred to in this section, is codified at 42 U.S.C.A. § 4601 et seq.

JUDICIAL DECISIONS

This chapter does not create additional elements compensable under eminent domain laws, but provides supplemental assistance for particular losses incurred by

reason of dislocation. *DeKalb County v. United Family Life Ins. Co.*, 235 Ga. 417, 219 S.E.2d 707 (1975).

22-4-3. Applicability of Code Section 22-1-1 to chapter.

The definitions contained in paragraphs (1) and (3) of Code Section 22-1-1 shall not apply to this chapter.

22-4-4. Payments by state, public agencies, etc., for relocation and replacement housing expenses.

The several public entities are authorized to and shall make or approve the payments required by Section 210 of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, Public Law 91-646, Ninety-first Congress, approved January 2, 1971, for the relocation expenses and replacement housing expenses of any person, family, business, farm operation, or nonprofit organization displaced by federal-aid public works projects in the state, the costs of which are now or hereafter financed in whole or in part from federal funds allocated to any of the several public entities. (Ga. L. 1973, p. 512, § 3.)

U.S. Code. — Section 210 of the federal referred to in this section, is codified at 42 Uniform Relocation Assistance and Real U.S.C.A. § 4630.
Property Acquisition Policies Act of 1970,

22-4-5. Providing of relocation assistance advisory services by state, public agencies, etc.

The several public entities are authorized to and shall provide the relocation assistance advisory services required by Section 210 of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, Public Law 91-646, Ninety-first Congress, approved January 2, 1971, for any person, family, business, farm operation, or nonprofit organization displaced by federal-aid public works projects in the state, the costs of which are now or hereafter financed in whole or in part from federal funds allocated to any of the several public entities. (Ga. L. 1973, p. 512, § 4.)

U.S. Code. — Section 210 of the federal referred to in this section, is codified at 42 Uniform Relocation Assistance and Real U.S.C.A. § 4630.
Property Acquisition Policies Act of 1970,

22-4-6. Payments by state, public agencies, etc., for expenses incidental to property transfer, for mortgage penalties, and for property taxes.

The several public entities are authorized to and shall make or approve the payments required by Section 305(2) of the Uniform Relocation Assis-

tance and Real Property Acquisition Policies Act of 1970, Public Law 91-646, Ninety-first Congress, approved January 2, 1971, for expenses incidental to the transfer of real property acquired by any of the several public entities, for prepayment of mortgage penalties, and for a pro rata portion of real property taxes on real property acquired by any of the several public entities from any person, family, business, farm operation, or nonprofit organization displaced by federal-aid public works projects in the state, the costs of which are now or hereafter financed in whole or in part from federal funds allocated to any of the several public entities. (Ga. L. 1973, p. 512, § 5.)

U.S. Code. — Section 305(2) of the federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of

1970, referred to in this section, is codified at 42 U.S.C.A. § 4655(2)..

JUDICIAL DECISIONS

This chapter does not require nor permit recovery of prepayment penalties as item of damages when federal funds are involved because such damages are not an

item of damages under Georgia law. DeKalb County v. United Family Life Ins. Co., 235 Ga. 417, 219 S.E.2d 707 (1975).

RESEARCH REFERENCES

ALR. — Compensation for interest prepayment penalty in eminent domain proceedings, 84 ALR3d 946.

22-4-7. Payments by state, public agencies, etc., for litigation expenses — Condemnation proceedings.

The several public entities are authorized to and shall make or approve the payments required by Section 305(2) of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, Public Law 91-646, Ninety-first Congress, approved January 2, 1971, for litigation expenses actually incurred by any person, family, business, farm operation, or nonprofit organization which is a condemnee in any condemnation proceeding brought by an acquiring public entity to acquire real property for a federal-aid public works project, the cost of which is now or hereafter financed in whole or in part from federal funds allocated to an acquiring public entity, if the final judgment is that the acquiring public entity cannot acquire the real property by condemnation or the condemnation proceeding is formally abandoned by the acquiring public entity. (Ga. L. 1973, p. 512, § 6.)

U.S. Code. — Section 305(2) of the federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, referred to in this section, is codified at 42 U.S.C.A. § 4655(2).

JUDICIAL DECISIONS

This statutory authority for payment of litigation expenses is separate and apart from condemnation proceeding. City of Atlanta v. Rosebush, 146 Ga. App. 99, 245 S.E.2d 440 (1978).

This section does not require that entire project for which land is condemned be abandoned, but only that the condemnation proceeding be abandoned. Jackson v. Alford, 244 Ga. 125, 259 S.E.2d 68 (1979).

Reasonable expenses incurred by defendants prior to receiving notice of dismissal are recoverable litigation

expenses. Jackson v. Alford, 244 Ga. 125, 259 S.E.2d 68 (1979).

Expenses of litigation, including attorney fees, must be paid by city, whether or not the city has established rules under § 22-4-11 for administering the payments; in the absence of such rules and regulations, mandamus is an appropriate means by which to compel the performance of city officials in compliance with this section. Jackson v. Alford, 244 Ga. 125, 259 S.E.2d 68 (1979).

22-4-8. Same — Inverse condemnation proceedings.

The several public entities are authorized to and shall make or approve the payments required by Section 305(2) of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, Public Law 91-646, Ninety-first Congress, approved January 2, 1971, for litigation expenses actually incurred by any person, family, business, farm operation, or nonprofit organization which is the plaintiff in any inverse condemnation proceeding brought against an acquiring public entity in which judgment is rendered in favor of the plaintiff for real property taken by the acquiring public entity in its execution of any federal-aid public works project, the costs of which are now or hereafter financed in whole or in part from federal funds allocated to the acquiring public entity. (Ga. L. 1973, p. 512, § 7.)

U.S. Code. — Section 305(2) of the federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, referred to in this section, is codified at 42 U.S.C.A. § 4655(2).

22-4-9. Policies to guide state, public agencies, etc., in acquiring property for federal-aid public works projects — Generally.

In acquiring real property for any federal-aid public works project, the costs of which are financed in whole or in part from federal funds allocated to an acquiring public entity, such public entity shall be guided by the land acquisition policies required by Section 305(1) of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970,

Public Law 91-646, Ninety-first Congress, approved January 2, 1971, and shall, to the greatest extent practicable, be guided by the following policies:

(1) An acquiring public entity shall make every reasonable effort to acquire expeditiously real property by negotiation;

(2) Real property shall be appraised before the initiation of negotiations, and the owner or his designated representative shall be given an opportunity to accompany the appraiser during his inspection of the property;

(3) Before the initiation of negotiations for real property, the acquiring public entity concerned shall establish an amount which it believes to be just compensation therefor and shall make a prompt offer to acquire the property for the full amount so established. In no event shall such amount be less than the amount of an appraisal of the fair market value of such property approved by the acquiring public entity. The acquiring public entity shall provide the owner of real property to be acquired with a written statement of, and summary of the basis for, the amount established by the public entity as just compensation. Where appropriate, the amount of just compensation for the real property acquired and for damages to remaining real property shall be separately stated;

(4) No owner shall be required to surrender possession of real property before the acquiring public entity pays the agreed purchase price; deposits into court for the benefit of the owner, pursuant to a declaration of taking, an amount which is approved by such acquiring public entity and which is not less than the amount of an appraisal of the fair market value of such property; or deposits into court for the benefit of the owner, pursuant to the award of assessors or a special master, the amount of the award of the assessors or special master;

(5) The construction or development of a federal-aid public works project shall be so scheduled that, to the greatest extent practicable, no person lawfully occupying real property shall be required to move from a dwelling (assuming a replacement dwelling will be available), or to move his business or farm operation, without at least 90 days' written notice from the acquiring public entity, of the date by which such move is required;

(6) If the acquiring public entity permits an owner or tenant to occupy the real property acquired on a rental basis for a short term, the amount of rent required shall not exceed the fair rental value of the property to a short-term occupier;

(7) In no event shall an acquiring public entity advance the time of condemnation, defer negotiations or condemnation and deposit of

funds in court for the use of the owner, or take any other coercive action in order to compel agreement on the price to be paid for the property;

(8) If any interest in real property is to be acquired by exercise of the power of eminent domain, the acquiring public entity shall institute formal condemnation proceedings. The acquiring public entity shall not intentionally make it necessary for an owner to institute legal proceedings to prove the fact of the taking of his real property;

(9) If the acquisition of only part of the property would leave its owner with an uneconomic remnant, as determined by the acquiring public entity, the acquiring public entity shall offer to acquire the entire property. (Ga. L. 1973, p. 512, § 8.)

U.S. Code. — Section 305(1) of the federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, referred to in this section, is codified at 42 U.S.C.A. § 4655(1).

JUDICIAL DECISIONS

Paragraphs (7) and (8) should not be read as statutory authority for property owner to compel institution of condemna- **tion proceedings by mandamus.** Clifton v. Berry, 244 Ga. 78, 259 S.E.2d 35 (1979).

22-4-10. Same — Acquisition of buildings, structures, and other improvements.

In acquiring property for any federal-aid public works project, the costs of which are financed in whole or in part from federal funds allocated to an acquiring public entity, the acquiring public entity shall be guided by the land acquisition policies relating to buildings, structures, and other improvements, specified by Section 305(1) of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, Public Law 91-646, Ninety-first Congress, approved January 2, 1971, and shall, to the greatest extent practicable, be guided by the following policies:

(1) Notwithstanding any other provision of law, if the acquiring public entity acquires any interest in real property, it shall acquire at least an equal interest in all buildings, structures, or other improvements which are located upon the real property so acquired and which it requires to be removed from such real property or which it determines will be adversely affected by the use to which such real property will be put;

(2) For the purpose of determining the just compensation to be paid for any building, structure, or other improvement required to be

acquired by paragraph (1) of this Code section, such building, structure, or other improvement shall be deemed to be part of the real property to be acquired, notwithstanding the right or obligation of a tenant, as against the owner of any other interest in the real property, to remove such building, structure, or other improvement at the expiration of his term; and the fair market value which such building, structure, or other improvement contributes to the fair market value of the real property to be acquired, or the fair market value of such building, structure, or other improvement for removal from the real property, whichever is the greater, shall be paid to the tenant therefor;

(3) Payment under this Code section shall not result in duplication of any payments otherwise authorized by law. No such payment shall be made unless the owner of the land involved disclaims all interest in the improvements of the tenant. In consideration for any such payment, the tenant shall bargain, sell, transfer, and convey to the acquiring public entity all his right, title, and interest in and to such improvements. Nothing in this Code section shall be construed to deprive the tenant of any rights to reject payment under this Code section and to obtain payment for such property interests in accordance with applicable law other than this Code section. (Ga. L. 1973, p. 512, § 9.)

U.S. Code. — Section 305(1) of the federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, referred to in this section, is codified at 42 U.S.C.A. § 4655(1).

22-4-11. Adoption of rules by state, public agencies, etc.; appeal and review.

(a) The several public entities are authorized to make such rules as may be necessary to provide for the administration of the financial assistance authorized by this chapter.

(b) The determination by the several public entities of the amount of any payment and to whom it shall be paid may be appealed and judicially reviewed in the manner prescribed by Chapter 13 of Title 50, the "Georgia Administrative Procedure Act." (Ga. L. 1973, p. 512, § 11.)

JUDICIAL DECISIONS

Judicial review provided by Ch. 13, T. 50 is applicable to "several public entities" as defined by § 22-4-2 as well as to those entities defined as an "agency" by § 50-13-2(a). *Wirt v. Metropolitan Atlanta Rapid Transit Auth.*, 139 Ga. App. 592,

229 S.E.2d 100 (1976).

And amendments to definition of "agency" will not influence such applicability. — "Several public entities" and the "agency" being alternative categories, amendments to the definition

of “agency” will not influence the applicability of Ch. 13, T. 50 to an entity which falls within the “several public entities” category. *Wirt v. Metropolitan Atlanta Rapid Transit Auth.*, 139 Ga. App. 592, 229 S.E.2d 100 (1976).

Expenses of litigation, including attorney fees, must be paid by city, whether or not the city has established rules under this section for administering the payments; in the absence of such rules and regulations,

mandamus is an appropriate means by which to compel the performance of city officials in compliance with § 22-4-6. *Jackson v. Alford*, 244 Ga. 125, 259 S.E.2d 68 (1979).

Cited in *City of Atlanta v. Rosebush*, 146 Ga. App. 99, 245 S.E.2d 440 (1978); *Metropolitan Atlanta Rapid Transit Auth. v. Wallace*, 243 Ga. 491, 254 S.E.2d 822 (1979).

22-4-11.1. Exercise by municipal corporations with population of 400,000 or more of powers granted under this chapter; effect of this Code section on other laws.

(a) In addition and supplementary to other powers provided by this chapter for the several public entities, any municipal corporation having a population of 400,000 or more according to the United States decennial census of 1970 or any future such census may exercise the powers provided by this chapter for public works projects which are not financed in whole or in part from federal funds, but which are financed wholly or in part from the funds of any such municipal corporation or from other nonfederal funding sources, if the governing authority of any such municipal corporation shall first pass an ordinance or resolution stipulating that such funds are to be spent in good faith anticipation of whole or partial reimbursement from federal funds. The costs incurred by any such municipal corporation pursuant to the authority provided by this Code section shall be a part of the costs of public works projects. In carrying out the powers granted under this Code section any such municipal corporation shall be authorized to:

(1) Provide all relocation assistance and payments as authorized by this chapter;

(2) Establish and implement all acquisition policies and practices authorized under this chapter; and

(3) Provide for reimbursement of all necessary expenses authorized under this chapter.

(b) This Code section shall not be construed to repeal or affect in any manner Code Section 32-8-1, relating to relocation assistance for persons displaced by federal-aid highway projects. (Ga. L. 1981, p. 1417, §§ 1, 2.)

22-4-12. Functions provided in chapter as public purposes; effect of chapter on power of state, public agencies, etc., to tax.

(a) The providing of all of the relocation assistances and payments described in this chapter and, in connection with the acquisition of real property for public works projects or programs, the establishing of all of the policies and practices described in this chapter, and the paying or reimbursing of all of the expenses described in this chapter are declared to be necessary and shall and do constitute governmental functions undertaken for public purposes. Therefore, public funds may be expended by said public entities in furtherance of such functions, and those public entities that possess the power of taxation in relation to the public works projects and programs referred to in this subsection may exercise such power in furtherance thereof.

(b) Nothing contained in this Code section should be construed as a grant of a power of taxation to any of the several public entities which do not possess, independently of this chapter, any powers of taxation. Rather, this Code section shall constitute a grant of the power of taxation in relation to the public purposes enumerated in subsection (a) of this Code section to such of the several public entities as possess, independently of this chapter, powers of taxation in relation to the particular public works project or program which is undertaken or sponsored by such public entity and which displaces a person, thereby giving rise to the necessity of relocation assistance and payments, or which requires the acquisition of real property, thereby necessitating the real property acquisition policies, practices, payments, and reimbursements described in this chapter. (Ga. L. 1973, p. 512, § 12.)

22-4-13. Payments under chapter as income or resources.

No payment received by a displaced person under this chapter shall be considered as income or resources for the purpose of determining the eligibility or extent of eligibility of any person for assistance under any state law or for the purposes of the state's personal income tax law, corporation tax law, or other tax laws. These payments shall not be considered as income or resources of any recipient of public assistance, and the payment shall not be deducted from the amount of aid to which the recipient would otherwise be entitled. (Ga. L. 1973, p. 512, § 13.)

22-4-14. Effect of chapter on condemnation proceedings.

Nothing contained in this chapter shall be construed as creating in any condemnation proceeding brought under the power of eminent domain any element of value or of damage. (Ga. L. 1973, p. 512, § 10.)

JUDICIAL DECISIONS

Georgia jurisprudence will set measure of damages for property condemned in Georgia under this chapter. *DeKalb County v. United Family Life Ins. Co.*, 235 Ga. 417, 219 S.E.2d 707 (1975).

Cited in *United Family Life Ins. Co. v.*

DeKalb County, 136 Ga. App. 822, 222 S.E.2d 664 (1975); *Department of Transp. v. Doss*, 238 Ga. 480, 233 S.E.2d 144 (1977); *City of Atlanta v. Rosebush*, 146 Ga. App. 99, 245 S.E.2d 440 (1978).

RESEARCH REFERENCES

ALR. — Compensation for interest prepayment penalty in eminent domain proceedings, 84 ALR3d 946.

TITLE 23

EQUITY

- Chap. 1. General Provisions, 23-1-1 through 23-1-25.
2. Grounds for Equitable Relief, 23-2-1 through 23-2-136.
3. Equitable Remedies and Proceedings Generally, 23-3-1 through 23-3-110.
4. Equity Procedure, 23-4-1 through 23-4-38.

Cross references. — As to authority of General Assembly to provide for punishment of fraud, see Ga. Const. 1976, Art. I, Sec. II, Para. XIII. As to merger of law and equity, see Ga. Const. 1976, Art. VI, Sec. IV, Para. II. As to venue for equity cases, see Ga. Const. 1976, Art. VI, Sec. XIV, Para. III. As to granting of injunctions generally, see Ch. 5, T. 9. As to venue for actions in equity generally, see Ga. Const. 1976, Art. VI, Sec. XIV, Para. III and § 9-10-30. As to trusts generally, see Ch. 12, T. 53.

CHAPTER 1

GENERAL PROVISIONS

Sec.		Sec.	
23-1-1.	Equity jurisdiction — Vested in superior courts.	23-1-14.	Who bears loss from act of third party.
23-1-2.	Same — Scope; modes of remedy.	23-1-15.	Where both parties equally at fault; where fault is unequal.
23-1-3.	Same — Grounds.	23-1-16.	Taking with notice of equity.
23-1-4.	Effect of legal remedy on exercise of jurisdiction.	23-1-17.	Scope of notice; ignorance due to negligence.
23-1-5.	Concurrent jurisdiction of law and equity.	23-1-18.	Pending action as notice; effect on purchaser.
23-1-6.	Nature of equity — Follows the law.	23-1-19.	Sale to one without notice; sale by one without notice.
23-1-7.	Same — Seeks to do justice.	23-1-20.	Interference with bona fide purchaser.
23-1-8.	Same — Considers done what ought to be done.	23-1-21.	Compulsion to litigate.
23-1-9.	Same — Is equality.	23-1-22.	Interference with creditor.
23-1-10.	Who would have equity must do equity.	23-1-23.	Construction of conditions; relief against forfeitures.
23-1-11.	Effect of equal equities; effect of unequal equities.	23-1-24.	When election between benefits compelled.
23-1-12.	Equity of misled party superior.	23-1-25.	Laches.
23-1-13.	Volunteer's equity inferior.		

23-1-1. Equity jurisdiction — Vested in superior courts.

All equity jurisdiction shall be vested in the superior courts of the several counties. (Laws 1799, Cobb's 1851 Digest, p. 467; Code 1863, § 3013; Code 1868, § 3025; Code 1873, § 3080; Code 1882, § 3080; Civil Code 1895, § 3921; Civil Code 1910, § 4518; Code 1933, § 37-101.)

Cross references. — See Ga. Const. 1976, Art. VI, Sec. IV, Para. II.

JUDICIAL DECISIONS

Equity determined by allegations contained in petition. — Whether an action is one at law or in equity is determined by the allegations of the petition and the nature of the relief prayed and not by the designation given to the action by the pleader. *Griffin v. Securities Inv. Co.*, 181 Ga. 455, 182 S.E. 594 (1935).

Equity jurisdiction is conferred upon the superior courts and not upon the judges thereof, and judges sitting in vacation are not courts of equity. *Humber v. Garrard*, 205 Ga. 357, 53 S.E.2d 748 (1949).

Equity had jurisdiction to render decrees in open court authorizing the several trustees to contract for loans and secure them by deed conveying the trust property. *Jackson v. Massachusetts Mut. Life Ins. Co.*, 183 Ga. 659, 189 S.E. 243 (1936).

In an equitable proceeding, it is the general rule that all persons having a legal or equitable interest in the subject matter of the suit must be made parties; and no court should undertake to reform a written instrument in an essential matter, without

having before it all the parties to be affected by the proposed reformation. *American Fid. & Cas. Co. v. Elder*, 189 Ga. 229, 5 S.E.2d 668 (1939).

Cited in *Watters v. Southern Brighton Mills*, 168 Ga. 15, 147 S.E. 87 (1929); *Lamb v. Lamb*, 169 Ga. 567, 150 S.E. 817 (1929); *Biddle v. Papa*, 180 Ga. 468, 179 S.E. 357

(1935); *McDowell v. McDowell*, 68 Ga. App. 363, 22 S.E.2d 851 (1942); *Rockefeller v. First Nat'l Bank*, 213 Ga. 493, 100 S.E.2d 279 (1957); *Miller v. New Amsterdam Cas. Co.*, 105 Ga. App. 174, 123 S.E.2d 717 (1961); *Moody v. Mendenhall*, 238 Ga. 689, 234 S.E.2d 905 (1977).

23-1-2. Same — Scope; modes of remedy.

Generally, equity jurisprudence embraces the same matters of jurisdiction and modes of remedy as were allowed and practiced in England. (Orig. Code 1863, § 3033; Code 1868, § 3045; Code 1873, § 3100; Code 1882, § 3100; Civil Code 1895, § 3945; Civil Code 1910, § 4542; Code 1933, § 37-124.)

JUDICIAL DECISIONS

In England, as well as in most of the states, the rule that equity acts upon the person of the defendant is held to prevail, in the absence of statutory modification; so that it remains the general rule that jurisdiction in rem or quasi in rem, in equity, just as at law, is the creature of statutes, which are to be strictly construed.

Grimmett v. Barnwell, 184 Ga. 461, 192 S.E. 191 (1937).

Cited in *Voyles v. Federal Land Bank*, 182 Ga. 569, 186 S.E. 405 (1936); *Jackson v. Massachusetts Mut. Life Ins. Co.*, 183 Ga. 659, 189 S.E. 243 (1936); *Rockefeller v. First Nat'l Bank*, 213 Ga. 493, 100 S.E.2d 279 (1957).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Equity, §§ 6, 118.

23-1-3. Same — Grounds.

Equity jurisdiction is established and allowed for the protection and relief of parties where, from any peculiar circumstances, the operation of the general rules of law would be deficient in protecting from anticipated wrong or relieving for injuries done. (Orig. Code 1863, § 3014; Code 1868, § 3026; Code 1873, § 3081; Code 1882, § 3081; Civil Code 1895, § 3922; Civil Code 1910, § 4519; Code 1933, § 37-102.)

JUDICIAL DECISIONS

The universal test of the jurisdiction of a court to issue injunctions is the absence of a legal remedy by which the complainant might obtain the full relief to which the facts and circumstances entitle him, and this is likewise the test of its power to restrain breaches of a contract. *Ford v. Finney*, 35 Ga. 258 (1866); *Chadwick v. Dolinoff*, 207 Ga. 702, 64 S.E.2d 76 (1951).

Equity will grant relief only where there is no available and adequate and complete remedy at law. *Colston v. Hutchinson*, 208 Ga. 559, 67 S.E.2d 763 (1951).

Where all relief sought can be obtained in the manner provided for by law, it is error for equity to intervene. *Waller v. Conner*, 218 Ga. 633, 129 S.E.2d 845 (1963); *Thomason v. Harper Motor Lines*, 225 Ga. 312, 168 S.E.2d 147 (1969).

Equity by writ of injunction will restrain any act which is illegal or contrary to equity and good conscience and for which no adequate remedy at law is provided. But where all the relief sought can be obtained in the manner provided by law, a suit in equity for injunction will not lie. *Lanier v. Suttles*, 212 Ga. 154, 91 S.E.2d 21 (1956).

Injunction does not lie where the complaining party has a plain and adequate remedy at law which is practical and efficient to the ends of justice and its prompt administration as the remedy in equity. *Thomason v. Harper Motor Lines*, 225 Ga. 312, 168 S.E.2d 147 (1969).

Since equity jurisdiction is for the relief of parties where the general rules of law would be deficient in protecting from anticipated wrong or affording relief for injuries done, there is no sound reason in law or equity why equity should not take jurisdiction and grant relief from a void marriage complained of that will be both adequate and complete. *Gearlach v. Odom*, 200 Ga. 350, 37 S.E.2d 184 (1946).

Where no legal reason appears from the allegations of the petition why the plaintiff, without seeking an injunction, is not possessed of an adequate and complete remedy at law; in the absence of such indispensable averments, the petition fails to state a proper cause for the extraordinary equitable remedy of injunction.

Chadwick v. Dolinoff, 207 Ga. 702, 64 S.E.2d 76 (1951).

When a statutory remedy by appeal has failed to eliminate the law violation or gross abuse of discretion which is its equivalent, equity will grant relief. *Carter v. Board of Educ.*, 221 Ga. 775, 147 S.E.2d 315 (1966).

Where, upon the death of the grantee in a deed executed by a married woman, a receiver is appointed for the property belonging to his estate, and the grantor in such a deed intervenes in the equitable proceeding for the purpose of asserting her right to recover the property so conveyed to the decedent, and mesne profits thereon, upon the ground that the conveyance was made in satisfaction of the debt of her husband, the proceeding is one in equity and is governed by equitable principles. In such a case the intervenor cannot recover against the assets in the hands of the receiver for administration in equity, without accounting for such portion of the consideration for her deed as was represented by her own obligation. *Turner v. Warren*, 193 Ga. 455, 18 S.E.2d 865 (1942).

Courts exercising equitable jurisdiction will not enjoin prosecutions under municipal ordinances, even where the ordinances are allegedly invalid and there are threats of arrest and multiplicity of prosecutions, unless it is shown that the threatened prosecutions are for the sole purpose of unlawfully taking or destroying property or the business of the plaintiff, or that they will in fact result in irreparable injury thereto, and unless the complaining party has no plain and adequate remedy at law which is as practical and efficient to the ends of justice and its prompt administration as its remedy in equity. *Arnold v. Mathews*, 226 Ga. 809, 177 S.E.2d 691 (1970).

Statement that decisions of the boards of education will not be interfered with by courts of equity unless they amount to a violation of law or are a gross abuse of discretion must be read and considered along with the rule of law that remedies at law, if adequate, must be exhausted before resort to equity will be allowed; when thus construed they mean simply that, when the

remedy by appeal has failed to eliminate the law violation or gross abuse of discretion which is its equivalent, equity will grant relief or, as is permissible in all cases to prevent irreparable injury, or where equity alone can grant adequate relief, exhaustion of the statutory remedy of appeal is not a prerequisite to relief in equity. *Bedingfield v. Parkerson*, 212 Ga. 654, 94 S.E.2d 714 (1956).

Where it is necessary to prevent irreparable injury or where equity alone can grant adequate relief, exhaustion of a statutory remedy of appeal is not a prerequisite to relief in equity. *Carter v. Board of Educ.*, 221 Ga. 775, 147 S.E.2d 315 (1966).

A court of equity should not exercise its extraordinary powers where there is no grave danger of impending injury; bare fears of injury will not authorize such action. *McPhaul v. Simon*, 181 Ga. 260, 182 S.E. 19 (1935).

The fact that repeated arrests and prosecutions may be instituted under an invalid ordinance will not, without more, justify equitable interference. *Jewel Tea Co. v. City of Cartersville*, 185 Ga. 799, 196 S.E. 712 (1938).

The fact that a prosecution may be based on an invalid ordinance does not, in the absence of other circumstances, justify intervention of equity changing the general rule. *Spur Distrib. Co. v. Mayor of Americus*, 190 Ga. 842, 11 S.E.2d 30 (1940).

Mere inconvenience and expense and apprehension of injury to property rights will not give equity jurisdiction; neither will mere general allegations of irreparable injury and deprivation of property rights. *Spur Distrib. Co. v. Mayor of Americus*, 190 Ga. 842, 11 S.E.2d 30 (1940).

Mere financial inability to furnish the bond required affords no lawful basis for equitable interference. *Grimmett v. Barnwell*, 184 Ga. 461, 192 S.E. 191 (1937).

As a general rule, equity will not decree specific performance of contracts relating to personal property. *Black v. American Vending Co.*, 239 Ga. 632, 238 S.E.2d 420 (1977).

Only under exceptional facts and circumstances may equity powers be used to restrain criminal prosecutions, even though their defense may be burdensome

and attended by inconvenience. *Spur Distrib. Co. v. Mayor of Americus*, 190 Ga. 842, 11 S.E.2d 30 (1940).

Where a petitioner seeking an equitable decree annulling a bigamous marriage asserts that he did not know at the time of the ceremony that the defendant was a married woman; he does not come into court with unclean hands barring him from equitable relief. *Gearllach v. Odom*, 200 Ga. 350, 37 S.E.2d 184 (1946).

Although it is uncertain that there can be a successfully-maintained proceeding in equity to annul a marriage that, as a matter of law, is null and void already, the designation of the petition as one for annulment is no reason why a decree as prayed, declaring the marriage void, should not be granted, since such a decree is essential to the full protection of the petitioner from injury that is and well may be anticipated as a result of a void marriage ceremony. *Gearllach v. Odom*, 200 Ga. 350, 37 S.E.2d 184 (1946).

When equity will enjoin foreclosure. — Where one borrows a sum of money and executes a deed to an undivided interest in certain realty to secure the repayment of the loan, the lender has a right to foreclose upon and sell the undivided interest; and a court of equity will not, unless under peculiar circumstances, enjoin him against enforcement of the security deed, so as to allow the debtor time to have the property partitioned. *Ward v. Gerdine*, 183 Ga. 722, 189 S.E. 588 (1937).

Restraint of criminal prosecution. — Allegations of petition by filling station operators asking protection from the effect of a city ordinance requiring payment by certain operators for a business license, in addition to the regular business license required of all gasoline filling stations, where the city marshal had made and was threatening to make cases against the petitioners for violation of the ordinance, the city was threatening to issue executions against plaintiff's property for the penalties in the ordinance, and there was no charter provision for the filing of affidavits of illegality, did not make out such a case as would take it out of the general rule that equitable powers may not be used to restrain criminal prosecution in enforcement of a municipal ordinance

alleged to be invalid. *Spur Distrib. Co. v. Mayor of Americus*, 190 Ga. 842, 11 S.E.2d 30 (1940).

Cited in *Edwards Mfg. Co. v. Hood*, 167 Ga. 144, 145 S.E. 87 (1928); *Harper v. Durden*, 177 Ga. 216, 170 S.E. 45 (1933); *Aetna Ins. Co. v. Lunsford*, 179 Ga. 716, 177 S.E. 727 (1934); *Sutton v. Adams*, 180 Ga. 48, 178 S.E. 365 (1934); *Biddle v. Papa*, 180 Ga. 468, 179 S.E. 357 (1935); *Lewis v. Board of Educ.*, 183 Ga. 687, 189 S.E. 233 (1936); *Manning v. Wills*, 193 Ga. 82, 17 S.E.2d 261 (1941); *Cummings v. Robinson*,

194 Ga. 336, 21 S.E.2d 627 (1942); *Hamrick v. Hamrick*, 206 Ga. 564, 58 S.E.2d 145 (1950); *Coffey v. City of Marietta*, 212 Ga. 189, 91 S.E.2d 482 (1956); *Hortman v. Yarbrough*, 214 Ga. 693, 107 S.E.2d 202 (1959); *Ayers v. Baker*, 216 Ga. 132, 114 S.E.2d 847 (1960); *Burch v. Williams*, 226 Ga. 10, 172 S.E.2d 417 (1970); *Hughes v. Albert*, 238 Ga. 721, 235 S.E.2d 34 (1977); *Pembroke State Bank v. Balboa Ins. Co.*, 144 Ga. App. 609, 241 S.E.2d 483 (1978).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Equity, §§ 19-27, 87.

C.J.S. — 30 C.J.S., Equity, §§ 19-38.

ALR. — Right of victim of practical joke to recover against its perpetrator, 9 ALR 364.

Jurisdiction of equity to protect personal rights, 14 ALR 295.

Constitutionality of statute conferring on chancery courts power to abate public nuisance, 22 ALR 542; 75 ALR 1298.

Power of equity in absence of statute to render deficiency judgment in foreclosure action, 34 ALR 1015.

Relief of purchaser against forfeiture of land contract, 40 ALR 182.

Breach of building or construction contract as ground of suit in equity for its rescission, 52 ALR 1175.

Validity and enforceability of restrictive covenants in contracts of employment, 52 ALR 1362; 67 ALR 1002; 98 ALR 964.

Inherent power of equity, at instance of a stockholder, to appoint receiver for, or to wind up, a solvent, going corporation, on ground of fraud, mismanagement, or dissensions, 61 ALR 1212; 91 ALR 665.

Relief in equity from mistake of law, 75 ALR 896.

Power of equity to enjoin prosecution of independent actions at law by different persons injured by the same tort, 75 ALR 1444.

Jurisdiction of equity on the ground of avoiding multiplicity of actions at law of suit to enforce statutory liability of

stockholders or to enjoin actions at law in that regard, 94 ALR 1372.

Jurisdiction of equity courts in the United States, without the aid of statute expressly conferring it, to entertain independent suit for alimony or separate maintenance without divorce or judicial separation, 141 ALR 399.

Right of lessee to equitable relief against forfeiture for breach of conditions as affected by lessor's giving a lease to or entering into other contractual obligations with a third person, 166 ALR 807.

Remedy at law available to beneficiary of trust as exclusive of remedy in equity, 171 ALR 429.

Injunction as remedy for breach of contract to employ plaintiff or give exclusive right to promote or sell defendant's product or invention, 173 ALR 1198.

Jurisdiction of equity to protect personal rights; modern view, 175 ALR 438.

Doctrine of constructive trust or unjust enrichment as applicable between owner and one who fraudulently procures tax certificates, 175 ALR 700.

Purchaser's misrepresentations as to intended use of real property as ground for vendor's equitable relief from contract and deed, 35 ALR3d 1369.

Construction and operation of parking-space provision in shopping-center lease, 56 ALR3d 596.

Right of contingent remainderman to maintain action for damages for waste, 56 ALR3d 677.

23-1-4. Effect of legal remedy on exercise of jurisdiction.

Equity will not take cognizance of a plain legal right where an adequate and complete remedy is provided by law; but the mere privilege of a party to bring an action at law or the existence of a common-law remedy not as complete or effectual as the equitable relief shall not deprive equity of jurisdiction. (Orig. Code 1863, § 3028; Code 1868, § 3040; Code 1873, § 3095; Code 1882, § 3095; Civil Code 1895, § 3941; Civil Code 1910, § 4538; Code 1933, § 37-120.)

JUDICIAL DECISIONS

It will be readily seen from this section that, if the law itself provides a full and adequate remedy, ordinarily that is the end of the matter, and equity will not interfere. *Grimmett v. Barnwell*, 184 Ga. 461, 192 S.E. 191 (1937).

Equity grants no relief to one who has an adequate remedy at law. *Goodman v. Georgia R.R. Bank & Trust Co.*, 221 Ga. 396, 144 S.E.2d 764 (1965).

Equity grants no relief to one who has an adequate and complete remedy at law for the redress of an actionable wrong. *Mayor of Carrollton v. Chambers*, 215 Ga. 193, 109 S.E.2d 755 (1959).

Where an adequate remedy at law exists equity is without jurisdiction of the case. *Y. v. S.*, 224 Ga. 352, 162 S.E.2d 321 (1968).

A money judgment having been rendered in a trover suit pending bankruptcy proceedings voluntarily instituted by the defendant therein, the petition brought by him to enjoin garnishment proceedings based on the trover judgment on the ground that the debt had been subsequently discharged by the order of the bankruptcy court, should have been dismissed on general demurrer (now motion to dismiss); because, if the debt was discharged, he could have fully protected himself by setting up this defense in the court where the garnishment case was pending and where he had an adequate and complete remedy at law, in which event a court of equity will not grant relief; and because a judgment for plaintiff in an action of trover, although rendered for a sum of money and not for the property in controversy, constitutes an adjudication of the plaintiff's title to the property, and the

debt thus created is not dischargeable in bankruptcy. *Nash Loan Co. v. Yonge*, 182 Ga. 672, 186 S.E. 811 (1936).

Insolvency of a subcontractor and inability to respond to such damages as the contractor might recover for breach of the contract is ground for equitable intervention. By bringing in the surety whose principal was insolvent the contractor would be able to obtain full relief, but the contractor's legal remedy would not be complete or as effective and efficient to the ends of justice as that which could be afforded by a court of equity. *Concrete Coring Contractors v. Mechanical Contractors & Eng'rs*, 220 Ga. 714, 141 S.E.2d 439 (1965).

Since the plaintiff had an adequate and complete remedy at law by affidavit of illegality, an affidavit of illegality, and not a petition for injunction, was the procedure which the plaintiff should have employed to test the validity of property tax assessments. *Mayor of Carrollton v. Chambers*, 215 Ga. 193, 109 S.E.2d 755 (1959).

In the absence of statutory authority, equity will not intervene where a party has a complete and adequate remedy at law and no other equitable reasons, such as avoidance of a multiplicity of suits or that the acts of the defendant complained of constitute a constantly recurring wrong, generally denominated a continuing wrong, are alleged. *Womble v. Georgia State Bd. of Exmrs. in Optometry*, 221 Ga. 457, 145 S.E.2d 485 (1965).

Where the petitioner sought to have an ordinance declared void, and the prosecutions enjoined, and by an amendment to

the charter disputed tax executions may be contested by affidavit of illegality, this adequate and complete remedy at law to contest the validity of the ordinance being available, the intervention of equity would not be authorized. *City of Eatonton v. Peck*, 207 Ga. 705, 64 S.E.2d 61 (1951).

If for any special reason the remedy by attachment against a nonresident debtor in an ordinary claim *ex contractu* or *ex delicto* is unavailable or inadequate, equity will lend its aid; but, where in such an ordinary claim the remedy by attachment is available and affords adequate relief, and where, the facts alleged fail to invoke any other recognized principle authorizing equitable relief, a court of equity will refuse to assume jurisdiction. *Grimmett v. Barnwell*, 184 Ga. 461, 192 S.E. 191 (1937).

Petition to have defendant enjoined from interfering with plaintiffs in possession of disputed part of land, possession and control of which was alleged to be in defendant, showed no ground for equitable relief, and the existence of an adequate remedy at law because a court of equity will not ordinarily entertain a bill solely for the purpose of establishing the title of a party to real estate, or for the recovery of possession thereof, as these objects can generally be accomplished by an action of ejectment at law. *Slaughter v. Land*, 190 Ga. 491, 9 S.E.2d 754 (1940).

Petition by a nonresident former wife, brought in Georgia, to recover a judgment for past-due monthly installments under a Florida decree for divorce and alimony, and to enjoin the former husband from transferring or encumbering Georgia's assets, was controlled by the general rules applicable to suits by creditors without a lien; and under the undisputed evidence, although the suit, if sustained by proof at the trial, would be maintainable on the prayer for a judgment at law, the court properly refused an interlocutory injunction, since the averments and evidence failed to show that the plaintiff did not have a full and complete remedy at law, as she apparently had by attachment, with or without garnishment, according to the facts, and since the burden was on her to show any exceptional facts making such a remedy at law inadequate. *Lawrence v.*

Lawrence, 196 Ga. 204, 26 S.E.2d 283 (1943).

A mere privilege to a party to sue at law, or the existence of a common-law remedy not as complete or effectual as the equitable relief, does not deprive equity of jurisdiction. *Quitman Cooperage Co. v. People's First Nat'l Bank*, 178 Ga. 90, 172 S.E. 17 (1933).

A bare threat of injury to property, which, if followed up by an overt act would work irreparable injury, affords no basis for equitable relief by injunction or otherwise. *Nottingham v. Elliott*, 209 Ga. 481, 74 S.E.2d 93 (1953).

Where a defendant has been served and a judgment is rendered against him by fraud, accident, or mistake, without fault or negligence on his part, a petition in equity to set aside the judgment will lie. *Dollar v. Fred W. Amend Co.*, 184 Ga. 432, 191 S.E.2d 696 (1937).

Where private property is actually about to be confiscated by the enforcement of an assessment for a local improvement, the remedy of affidavit of illegality as provided in the city charter is not as complete or effectual as equitable relief; in such a case an injunction may be granted. *Holst v. City of La Grange*, 175 Ga. 402, 165 S.E. 217 (1932).

Where the plaintiff contends all partnership relations between the plaintiff and the defendant have come to an end, that a balance has been struck, and that an indebtedness is allegedly due by the defendant to the plaintiff, which cannot be affected by any transactions between the partnership and its creditors or debtors, this is not an equitable action by a member of a firm against his copartner, but an action of law, one man against another who has formerly been his partner, upon an indebtedness a part of which grew out of the formerly existing partnership between them. *Manry v. Hendricks*, 192 Ga. 319, 15 S.E.2d 434 (1941).

Where the partnership has been fully dissolved by written contract and the rights of each party definitely established, in case of a breach of such contract equity will not order an accounting, as the remedy is at law. *Manry v. Hendricks*, 192 Ga. 319, 15 S.E.2d 434 (1941).

Even if in any case equity can remove an

executor, where there were no allegations in petition seeking inter alia removal of an executor for fraud and conspiracy tending to show why complainants could not by pursuing the remedy provided by law before the court of ordinary (now probate court) as pointed out in § 53-7-32, obtain relief as complete and effectual as in a court of equity, under the principle codified in this section, equity would not assume jurisdiction. *Georgia Baptist Orphans Home v. Weaver*, 193 Ga. 669, 19 S.E.2d 272 (1942).

Where plaintiff alleges that he provided certain labor and materials used in the construction of an apartment house under a contract with subcontractor of general contractor, for which he has not been paid, and alleges no reason why his remedy at law, suit on the contract, would not be adequate, full, and complete, nor does he allege that subcontractor is insolvent or unable in any way to respond in damages, or is a nonresident of the state, trial court did not err in sustaining the general demurrer (now motion to dismiss). *Maggi v. Sylvan Circle Apts., Inc.*, 207 Ga. 580, 63 S.E.2d 368 (1951).

Mere apprehension of danger, unless founded upon reason, will not require equitable relief. *Maggi v. Sylvan Circle Apts., Inc.*, 207 Ga. 580, 63 S.E.2d 368 (1951).

Mere financial inability to furnish the bond required affords no lawful basis for equitable interference. *Grimmett v. Barnwell*, 184 Ga. 461, 192 S.E. 191 (1937).

A mere verbal claim to, or assertion of ownership in, property is not such a cloud upon the title of the owner as can be removed by equitable proceedings. *Nottingham v. Elliott*, 209 Ga. 481, 74 S.E.2d 93 (1953).

A remedy at law, to exclude appropriate relief in equity, must be complete and the substantial equivalent of the equitable relief. — It is not enough that there is a remedy at law. It must be plain and adequate, or, in other words, as practical and as efficient to the ends of justice and its prompt administration as the remedy in equity. *Davis v. Logan*, 206 Ga. 524, 57 S.E.2d 568 (1950).

An unconstitutional or void statutory provision will not furnish an adequate remedy at law. *Stinson v. Manning*, 221

Ga. 487, 145 S.E.2d 541 (1965).

Where it is necessary to prevent irreparable injury or where equity alone can grant adequate relief, exhaustion of a statutory remedy of appeal is not a prerequisite to relief in equity. *Carter v. Board of Educ.*, 221 Ga. 775, 147 S.E.2d 315 (1966).

When a statutory remedy by appeal has failed to eliminate the law violation or gross abuse of discretion which is its equivalent, equity will grant relief. *Carter v. Board of Educ.*, 221 Ga. 775, 147 S.E.2d 315 (1966).

Property owners dissatisfied with the act of a building inspector in issuing a permit to erect a church have the right to appeal from the order of the building inspector to the board of adjustment. *Ledbetter v. Callaway*, 211 Ga. 607, 87 S.E.2d 317 (1955).

As a general rule, equity will not decree specific performance of contracts relating to personal property. *Black v. American Vending Co.*, 239 Ga. 632, 238 S.E.2d 420 (1977).

A court of equity will not ordinarily entertain a bill solely for the purpose of establishing title of a party to real estate, or for the recovery of possession thereof, as these objects can generally be accomplished by an action of ejectment of law. *Collier v. Garner*, 177 Ga. 467, 170 S.E. 353 (1933); *Nottingham v. Elliott*, 209 Ga. 481, 74 S.E.2d 93 (1953).

Except in a case specially provided for by statute, equity will not interfere to restrain a trespass, unless the injury is irreparable in damages, or the trespasser is insolvent, or there exist other circumstances which, in the discretion of the court, render the interposition of this writ necessary and proper. *Collier v. Garner*, 177 Ga. 467, 170 S.E. 353 (1933); *Nottingham v. Elliott*, 209 Ga. 481, 74 S.E.2d 93 (1953).

Where a petition does not allege facts showing irreparable damages nor any trespass by the defendant upon any lands claimed by the petitioner, nor that the defendant is insolvent, and does not show why a court of equity should take jurisdiction in order to avoid multiplicity of action, the petition failed to state a cause of action for any equitable relief. *Shobkov v. Pennington*, 217 Ga. 315, 122 S.E.2d 87 (1961).

Cited in Bowden v. Georgia Pub. Serv. Comm'n, 170 Ga. 505, 153 S.E. 42 (1930); American Security Co. v. Miller, 173 Ga. 82, 159 S.E. 692 (1931); Reid v. Gordon, 173 Ga. 168, 159 S.E. 708 (1931); Sutton v. Adams, 180 Ga. 48, 178 S.E. 365 (1934); Gavant v. Berger, 180 Ga. 753, 180 S.E. 613 (1935); Jackson v. Becker Roofing Co., 180 Ga. 769, 180 S.E. 822 (1935); Pendley v. Tumlin, 181 Ga. 808, 184 S.E. 283 (1936); Hodges v. State Revenue Comm'n, 183 Ga. 832, 190 S.E. 36 (1937); Wallace v. Stovall, 189 Ga. 195, 5 S.E.2d 635 (1939); Bibb County v. Winslett, 191 Ga. 860, 14 S.E.2d 108 (1941); McCord v. Walton, 192 Ga. 279, 14 S.E.2d 723 (1941); Matson v. Crowe, 193 Ga. 578, 19 S.E.2d 288 (1942); Stephens v. City Council, 193 Ga. 815, 20 S.E.2d 80 (1942); Cummings v. Robinson, 194 Ga. 336, 21 S.E.2d 627 (1942); Robinson v. Murray, 198 Ga. 690, 32 S.E.2d 496 (1944); Dwyer v. Jones, 201 Ga. 259, 39 S.E.2d 313 (1946); Fulmer v. Wilkins, 201 Ga. 322, 39 S.E.2d 405 (1946); Haney v. Sheppard, 207 Ga. 158, 60 S.E.2d 453 (1950); Ware v. Martin, 207 Ga. 512, 63 S.E.2d 335 (1951); Scarbrough v. Cook, 208 Ga. 697, 69 S.E.2d 201 (1952);

Williamon v. Williamon, 209 Ga. 494, 74 S.E.2d 71 (1953); Boatright v. Yates, 211 Ga. 125, 84 S.E.2d 195 (1954); Patterson v. Boyd, 211 Ga. 679, 87 S.E.2d 861 (1955); Winn v. Morton, 212 Ga. 282, 92 S.E.2d 97 (1956); Hortman v. Yarbrough, 214 Ga. 693, 107 S.E.2d 202 (1959); Ramsey v. Womack, 214 Ga. 722, 107 S.E.2d 180 (1959); Ellis v. City of Atlanta, 214 Ga. 811, 108 S.E.2d 269 (1959); Ayers v. Baker, 216 Ga. 132, 114 S.E.2d 847 (1960); K. Gordon Murray Prods., Inc. v. Floyd, 217 Ga. 784, 125 S.E.2d 207 (1962); Stein Steel & Supply Co. v. Briggs Mfg. Co., 219 Ga. 779, 135 S.E.2d 862 (1962); Murdock v. Perkins, 219 Ga. 756, 135 S.E.2d 869 (1964); Clements v. Elder, 221 Ga. 438, 145 S.E.2d 246 (1965); Parker v. Davidson, 223 Ga. 672, 157 S.E.2d 489 (1967); Burch v. Williams, 226 Ga. 10, 172 S.E.2d 417 (1970); Jonesboro Area Athletic Ass'n v. Dickson, 227 Ga. 513, 181 S.E.2d 852 (1971); Burnham v. Lynn, 235 Ga. 207, 219 S.E.2d 111 (1975); Allsouth Sprinkler Co. v. Network Bldg. Systems, 238 Ga. 372, 233 S.E.2d 174 (1977); City of Atlanta v. Wolcott, 240 Ga. 244, 240 S.E.2d 83 (1977).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Equity, §§ 10, 89.

C.J.S. — 30 C.J.S., Equity, § 89.

ALR. — Constitutionality of statute conferring on chancery courts power to

abate public nuisance, 22 ALR 542; 75 ALR 1298.

Injunction against exercise of power of eminent domain, 93 ALR2d 465.

23-1-5. Concurrent jurisdiction of law and equity.

Where law and equity have concurrent jurisdiction, whichever first takes jurisdiction shall retain it, unless a good reason shall be given for the interference of equity. (Orig. Code 1863, § 3029; Code 1868, § 3041; Code 1873, § 3096; Code 1882, § 3096; Civil Code 1895, § 3943; Civil Code 1910, § 4540; Code 1933, § 37-122.)

JUDICIAL DECISIONS

Where law and equity have concurrent jurisdiction, the court first taking will retain it, unless a good reason can be given for the interference of equity. Duke v.

Duke, 181 Ga. 21, 181 S.E. 161 (1935); Robinson v. Georgia Sav. Bank & Trust Co., 185 Ga. 688, 196 S.E. 395 (1938).

A court of equity has concurrent juris-

diction with the judge of probate court over the settlement of accounts of administrators and executors; and the court first taking jurisdiction will retain it. Terry v. Chandler, 172 Ga. 715, 158 S.E. 572 (1931).

While the ordinary (now judge of probate court) and the judge of the superior court have equal and concurrent jurisdiction in a habeas corpus proceeding between husband and wife involving the custody of their child, it is the general rule that, where two courts have such concurrent jurisdiction over the subject matter and the parties, the court first taking jurisdiction will retain it unless some good reason be shown for equitable interference. Breeden v. Breeden, 202 Ga. 740, 44 S.E.2d 667 (1947).

While the ordinary (now judge of probate court) and the judge of the superior court have equal and concurrent jurisdiction in determining the custody of the children of husband and wife living in a state of separation, only the superior court, so far as habeas corpus proceedings may be resorted to, has jurisdiction of such subject matter when related to a suit for divorce, and superior court judge who, after a habeas corpus proceeding before the ordinary (now judge of probate court) acquires jurisdiction of the subject matter in a divorce proceeding, may properly enjoin further progress of the former proceeding before the ordinary (now judge of probate court), in order that all questions raised by the divorce suit may be considered together. Ponder v. Ponder, 198 Ga. 781, 32 S.E.2d 801 (1945).

Since equity has concurrent jurisdiction with courts of ordinary (now probate courts) in the administration of estates, where its interference is necessary for the full protection of the rights of parties at interest and since it is a recognized rule that, where the heirs at law get together and agree to divide the estate and appoint an agent and put him in possession of the property for that purpose, a bill may be filed against him by any one or more of the distributees, the same as against an administrator, it cannot be said that, a petition seeking an order restraining the heir's agent from the alleged fraudulent acts, and

a receivership under direction of the court of equity was devoid of equity. Shingler v. Shingler, 184 Ga. 671, 192 S.E. 824 (1937).

Where the superior court acquired jurisdiction of the question of the custody of a child in a divorce case, it retained that jurisdiction for the purpose of rendering a final judgment as to the custody of the child, and where the attempted dismissal by the wife of the proceeding was ineffectual, the ordinary (now judge of probate court) of the county, to whom the wife presented a petition for the writ of habeas corpus, was without jurisdiction to act upon the petition. Breeden v. Breeden, 202 Ga. 740, 44 S.E.2d 667 (1947).

Where a habeas corpus proceeding is filed in the court of ordinary (now probate court), involving custody of a minor child, and subsequently a petition is filed involving divorce, alimony, and the custody of such child, equity has power to enjoin the habeas corpus proceeding and determine all the issues in one action. Duke v. Duke, 181 Ga. 21, 181 S.E. 161 (1935).

Where the court has acquired equitable jurisdiction of the parties and the cause by virtue of equitable averments and prayers, it retains jurisdiction for all related purposes as made by the pleadings. Kniepkamp v. Richards, 192 Ga. 509, 16 S.E.2d 24 (1941).

Where it appears from a petition praying for an accounting that there was pending in another court a suit by the corporate defendant against the plaintiff, such court being empowered to render an accounting between the parties, and no special reason being set out why a court of equity should assume jurisdiction for such purpose, equity will not enjoin the proceedings and processes of a court of law in the absence of some intervening equity or other proper defense of which the party, without fault on his part, cannot avail himself at law. Peoples v. Peoples, 193 Ga. 358, 18 S.E.2d 629 (1942).

Equity will not interfere with the regular administration of estates at the instance of an heir except where there is danger of loss or other injury to his interest. Gill v. Gill, 211 Ga. 567, 87 S.E.2d 389 (1955).

Cited in Davis v. Culpepper, 167 Ga. 637, 146 S.E. 319 (1929); Calbeck v.

Herrington, 169 Ga. 869, 152 S.E. 53 (1930); Darby v. Green, 174 Ga. 146, 162 S.E. 493 (1932); Chase v. Bartlett, 176 Ga. 40, 166 S.E. 832 (1932); McCord v. Walton, 192 Ga. 279, 14 S.E.2d 723 (1941); Beavers v. Williams, 199 Ga. 114, 33 S.E.2d 343 (1945); Taylor v. Abbott, 201 Ga. 254, 39 S.E.2d 471 (1946); Walker Electrical Co. v. Walton, 203 Ga. 246, 46 S.E.2d 184 (1948);

Hoffman v. Chester, 204 Ga. 296, 49 S.E.2d 760 (1948); Hamrick v. Hamrick, 206 Ga. 564, 58 S.E.2d 145 (1950); Clark v. White, 185 F.2d 528 (5th Cir. 1950); Rountree v. Davis, 90 Ga. App. 223, 82 S.E.2d 716 (1954); Seckinger v. Citizens & S. Nat'l Bank, 213 Ga. 586, 100 S.E.2d 587 (1957); Simpson v. American Nat'l Bank, 139 Ga. App. 112, 227 S.E.2d 903 (1976).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Equity, §§ 10, 88, 158.

C.J.S. — 30 C.J.S., Equity, § 21.

23-1-6. Nature of equity — Follows the law.

Equity is ancillary, not antagonistic, to the law; hence, equity follows the law where the rule of law is applicable and follows the analogy of the law where no rule is directly applicable. (Orig. Code 1863, § 3016; Code 1868, § 3028; Code 1873, § 3083; Code 1882, § 3083; Civil Code 1895, § 3923; Civil Code 1910, § 4520; Code 1933, § 37-103.)

JUDICIAL DECISIONS

Rule that equity follows the law has become first maxim of equity. Lewis v. Board of Educ., 183 Ga. 687, 189 S.E. 233 (1936).

Equity is not antagonistic to the law, but follows the law. Irwin v. Life & Cas. Ins. Co., 204 Ga. 582, 50 S.E.2d 354 (1948).

While equity follows the law as to limitations of actions, neither laches nor the statute of limitations will run against one in peaceable possession of property under a claim of ownership for delay in resorting to the courts to establish his rights. Crow v. Whitfield, 105 Ga. App. 436, 124 S.E.2d 648 (1962).

A judge could not refuse to grant an injunction to which a party was entitled under the law, unless that party would agree to waive the incompetency declared by statute of a witness as to the particular testimony sought to be delivered by him, as equity is not antagonistic to the law, but follows the law. Ferrell v. Wight, 187 Ga. 360, 200 S.E. 271 (1938).

A court of equity will not set aside a judgment, although obtained by willful and corrupt perjury, unless it appears that the perjurer has been convicted of such perjury, and unless it appears that a judgment could not have been rendered without the perjured testimony. Hutchings v. Roquemore, 171 Ga. 359, 155 S.E. 675 (1930).

Where an unmarried man procures a life insurance policy on his own life in which his mother is named beneficiary, and the policy gives the insured the right to change the beneficiary at any time, and subsequently as a consideration for marriage he agrees to substitute his wife as beneficiary in the insurance policy and tells his wife that he has made the change, but later dies without ever having attempted to have the beneficiary changed, the mother is vested with title to the proceeds of the policy upon the death of the insured, and nothing that the insurer can do thereafter can destroy or impair the mother's title thereto; and a court of equity is required, in a contest be-

tween the mother and the wife, to award the proceeds of the insurance policy to the mother. *Loyd v. Loyd*, 203 Ga. 775, 48 S.E.2d 365 (1948).

In a contract suit against a nonresident of Georgia who could not be served personally, praying for a temporary receiver to take charge of certain securities and hold them subject to the order of the court and for other relief where legal attachment was impossible and a court of equity intervened, the court was authorized to require a bond of the plaintiff, similar to an attachment bond. *Maryland Cas. Co. v. Tow*, 71 Ga. App. 178, 30 S.E.2d 433 (1944).

Between a debtor and his judgment creditor the controlling equity lies in favor of the creditor to have satisfaction of his judgment and a court of equity will rarely, if ever, interfere with the creditor in his use of the legal means afforded him for the collection of his debt. *Shedden v. National Florence Crittenton Mission*, 191 Ga. 428, 12 S.E.2d 618 (1940).

Since equity follows the analogy of the law, when fraud is charged, the period of limitations applicable to an action for fraud is the same as that which would apply to an action for the land, that is seven years from the discovery of the fraud. *Slade v. Barber*, 200 Ga. 405, 37 S.E.2d 143 (1946).

Equity will not give relief when to do so would violate express provisions of a statute. *Lewis v. Board of Educ.*, 183 Ga. 687, 189 S.E. 233 (1936).

Power to levy and collect taxes is exclu-

sively a legislative function, and unless authorized by statute, a court of equity is without power to foreclose a lien for taxes and order a sale of the property; no such power having been conferred by statute on a court of equity in this state, the court erred in decreeing that land be sold by the sheriff for payment of state and county taxes. *Kirk v. Bray*, 181 Ga. 814, 184 S.E. 733 (1935).

Delay alone is never enough to show laches where there is applicable statute of limitations. *Clover Realty Co. v. J.L. Todd Auction Co.*, 240 Ga. 124, 239 S.E.2d 682 (1977).

Cited in *Lowry v. City Inv. Co.*, 174 Ga. 454, 163 S.E. 208 (1932); *A.J. Evans Marketing Agency, Inc. v. Federated Growers' Credit Corp.*, 175 Ga. 294, 165 S.E. 114 (1932); *Grice v. United States Fid. & Guar. Co.*, 187 Ga. 259, 200 S.E. 700 (1938); *Liberty Mut. Ins. Co. v. Ragan*, 191 Ga. 811, 14 S.E.2d 88 (1941); *Rose v. Crane Heating Co.*, 198 Ga. 295, 31 S.E.2d 717 (1944); *Consolidated Realty Invs., Inc. v. Gasque*, 203 Ga. 790, 48 S.E.2d 510 (1948); *Hughes v. Griner*, 208 Ga. 47, 65 S.E.2d 24 (1951); *Vinson v. Citizens & S. Nat'l Bank*, 208 Ga. 813, 69 S.E.2d 866 (1952); *Woo v. Markwalter*, 210 Ga. 156, 78 S.E.2d 473 (1953); *Bair v. Willis*, 218 Ga. 563, 129 S.E.2d 774 (1963); *Richards v. Johnson*, 219 Ga. 771, 135 S.E.2d 881 (1964); *Dunn v. Dunn*, 221 Ga. 368, 144 S.E.2d 758 (1965); *McDonald v. McDonald*, 232 Ga. 190, 205 S.E.2d 850 (1974).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Equity, §§ 123, 124.

C.J.S. — 30 C.J.S., Equity, § 103.

ALR. — Jurisdiction of equity to protect personal rights; modern view, 175 ALR 438.

23-1-7. Same — Seeks to do justice.

Equity seeks always to do complete justice. Hence, having the parties before the court rightfully, it will proceed to give full relief to all parties in reference to the subject matter of the action, provided the court has jurisdiction for that purpose. (Orig. Code 1863, § 3018; Code 1868, § 3030; Code 1873, § 3085; Code 1882, § 3085; Civil Code 1895, § 3925; Civil Code 1910, § 4522; Code 1933, § 37-105.)

JUDICIAL DECISIONS

Maxim embodied in this section is a favorite maxim of equity. *Henderson v. Lott*, 163 Ga. 326, 136 S.E. 403 (1926); *Roach v. Terry*, 164 Ga. 421, 138 S.E. 902 (1927).

Rule that equity seeks always to do complete justice will not bring into equitable jurisdiction matters over which another court has exclusive jurisdiction. *Benton v. Turk*, 188 Ga. 710, 4 S.E.2d 580 (1939).

Equity, having first acquired jurisdiction, will retain it to exclusion of all other courts, and for all other purposes. *Gay v. Crockett*, 217 Ga. 288, 122 S.E.2d 241 (1961).

The court of equity after taking jurisdiction for the grant of extraordinary relief will retain it for all purposes. *McCord v. Walton*, 192 Ga. 279, 14 S.E.2d 723 (1941).

Where a court of equity obtains jurisdiction for one purpose it will retain it until full and satisfactory justice is rendered to all parties concerned. *Kidd v. Finch*, 188 Ga. 492, 4 S.E.2d 187 (1939).

Where judge has exercised jurisdiction on the question of the sale of the property of wards for reinvestment in United States bonds, he has the right to retain jurisdiction for the purpose of passing upon the claim of the intervenor to a just and reasonable commission for producing the buyer of the property, thus rendering full and complete relief to all parties to the cause. *Turner v. Prigmore*, 202 Ga. 377, 43 S.E.2d 259 (1947).

Equity seeks to do complete justice, and to give full relief to all parties in reference to subject matter of suit, provided the court has jurisdiction for that purpose. *Quitman Cooperage Co. v. People's First Nat'l Bank*, 178 Ga. 90, 172 S.E. 17 (1933).

It is one of the maxims of equity that it will not do justice by halves, and what constitutes its chief value is that it can bring before it all parties engaged in a transaction, and however diversified their interests and liabilities may be, it can frame a decree giving each complainant his right, and holding each defendant to his proper accountability. *Matson v. Crowe*, 193 Ga. 578, 19 S.E.2d 288 (1942).

When court has acquired equitable jurisdiction, it will grant complete relief as to all matters to which parties may be entitled under the pleadings and the proof, even though such relief may include legal rights and remedies. *Latham v. Fowler*, 192 Ga. 686, 16 S.E.2d 591 (1941).

Where equity acquires jurisdiction for any purpose, it will retain jurisdiction to give full and complete relief, whether legal or equitable, as to all purposes relating to the subject matter. *Kirk v. Hasty*, 239 Ga. 362, 236 S.E.2d 667 (1977); *Early v. Early*, 243 Ga. 125, 252 S.E.2d 618 (1979).

To preserve a trust estate, to supervise its management, to hold the trustee to the line of duty, for the purpose of preserving its corpus for the benefit of the beneficiaries, is an elementary branch of equity jurisprudence. The judge of the superior court of each county has power, either in term or at chambers, to remove and appoint trustees. When a court of equity obtains jurisdiction for one purpose, it will proceed to give full relief to all parties with reference to the subject matter of the suit, where it has jurisdiction for that purpose. *Fine v. Saul*, 183 Ga. 309, 188 S.E. 439 (1936).

Suits in equity shall be tried in the county where a defendant resides against whom substantial relief is prayed; and he who would have equity must do equity. Hence equity, having the parties before the court rightfully, will proceed to give full relief to all parties in reference to the subject matter provided the court has jurisdiction thereof. *Pearson v. George*, 211 Ga. 18, 83 S.E.2d 593 (1954).

Since equity has concurrent jurisdiction with courts of ordinary (now probate courts) in the administration of estates, where its interference is necessary for the full protection of the rights of parties at interest and since it is a recognized rule that, where the heirs at law get together and agree to divide the estate and appoint an agent and put him in possession of the property for that purpose, a bill may be filed against him by any one or more of the distributees, the same as against an administrator, it cannot be said that a petition seeking an order restraining the heir's

agent from the alleged fraudulent acts and a receivership under direction of the court of equity was devoid of equity. *Shingler v. Shingler*, 184 Ga. 671, 192 S.E. 824 (1937).

In an action in equity, brought against the sole heir at law of a deceased person, to reform a deed executed by a decedent and to recover possession and damages in the nature of mesne profits from a tenant of the heir at law in possession of the property, and to cancel security deeds executed by the heir at law in favor of third persons, the element of the need for reformation of the deed constitutes a common nexus in which all the parties are interested, authorizing the joinder of all interested parties; and since the other relief, both legal and equitable, prayed against the other parties respectively, for recovery of possession and damages for mesne profits and for cancellation of the security deeds, is merely such relief as is needful to make complete the justice to be done by reforming the deed, the action is not multifarious. *Mims v. Lifsey*, 192 Ga. 366, 15 S.E.2d 440 (1941).

Where the holder of a deed from a deceased person brings an action in equity against the sole heir at law of the decedent, there being no administration of the decedent's estate, to reform the deed so as to make the description in the deed include lands held adversely by the heir at law and his tenant for years, it is proper to join also as defendants persons to whom the heir at law has executed deeds to secure debt. It is proper in an action to reform an instrument to join as defendants all who are interested adversely to the reformation. *Mims v. Lifsey*, 192 Ga. 366, 15 S.E.2d 440 (1941).

Where court has jurisdiction for the purpose of giving injunctive relief against a nuisance, it could under the well-established law of this state retain it as to damages in order to do complete justice between the parties, and upon proper determination of the damages caused by each of the defendants could render judgment against them for their proportionate parts of the damage done. *Vaughn v. Burnette*, 211 Ga. 206, 84 S.E.2d 568 (1954).

Where the complainants under their allegations were entitled in equity to an

accounting, and the amount which by the accounting they sought to establish was due them, if at all, as remainder legatees under their mother's will, the right of the executor to sell the property, the right of the petitioners to have a partition, and their right to a judgment against the defendant personally all related to the same thing, to wit, the management by the defendant as trustee and executrix of property disposed of by their mother in her will, and a court of equity would in the same suit undertake to settle the other controversies growing out of the same subject matter, and grant the other relief indicated in the prayers relating to injunction and partition, although these, standing alone, could not be granted. *Matson v. Crowe*, 193 Ga. 578, 19 S.E.2d 288 (1942).

An equity court, by the continuing receivership, has jurisdiction to make a final disposition of the property according to the respective interests of the parties, and to this end can order a division by sale if necessary. *Roberts v. Federal Land Bank*, 180 Ga. 832, 181 S.E. 180 (1935).

As general rule court of equity will not intervene to enjoin collection of tax where no execution has been issued and levied on any of the property of the taxpayer, even though the taxing authorities may have demanded of him that he pay the tax. *Warren v. Suttles*, 190 Ga. 311, 9 S.E.2d 172 (1940).

Where plaintiff's petition for injunction against tax collector's interference with a boxing exhibition and collection of tax alleged that he had been notified by the tax collector that he would not permit him to stage his boxing bout if the tax was not paid, that the tax collector would carry out his threat if not enjoined, and that such conduct would cause him irreparable injury and damage, equity had jurisdiction and authority to grant an injunction under the facts when the petition was presented and sanctioned, and fact that at the time of the hearing part of the relief sought, enjoining the tax collector from closing the plaintiff's boxing exhibition, was no longer appropriate for consideration since the exhibition had been held under the protection of a temporary restraining order should not have prevented the court from retaining jurisdiction of the case for the

purpose of determining the legality of the alleged tax and granting a permanent injunction against its collection. *Warren v. Suttles*, 190 Ga. 311, 9 S.E.2d 172 (1940).

Action for land may be included in petition for equitable relief. *Latham v. Fowler*, 192 Ga. 686, 16 S.E.2d 591 (1941).

Cited in *McKinney v. Powell*, 149 Ga. 422, 100 S.E. 375 (1919); *Calbeck v. Herrington*, 169 Ga. 869, 152 S.E. 53 (1930); *Georgia Creosoting Co. v. Moody*, 41 Ga. App. 701, 154 S.E. 294 (1930); *Holst v. City of La Grange*, 175 Ga. 402, 165 S.E. 217 (1932); *F.S. Royster Guano Co. v. Stedham*, 178 Ga. 217, 172 S.E. 555 (1934); *Justice v. Warner*, 178 Ga. 579, 173 S.E. 703 (1934); *Welch v. Williford*, 182 Ga. 192, 185 S.E. 91 (1936); *Voyles v. Federal Land Bank*, 182 Ga. 569, 186 S.E. 405 (1936); *Ellis v. Millen Hotel Co.* 192 Ga. 66, 14 S.E.2d 565 (1941); *Sangster v. Toledo Mfg. Co.*, 193 Ga. 685, 19 S.E.2d 723 (1942); *Adcock v. Berry*, 194 Ga. 243, 21 S.E.2d 605 (1942); *Cummings v. Robinson*, 194 Ga. 336, 21 S.E.2d 627 (1942); *Pass v. Pass*, 195 Ga. 155, 23 S.E.2d 697 (1942); *Hughes v. Cobb*, 195 Ga. 213, 23 S.E.2d 701 (1942); *Robinson v. Murray*, 198 Ga. 690, 32 S.E.2d 496 (1944); *Fulmer v. Wilkins*, 201 Ga. 322, 39 S.E.2d 405 (1946); *Toler v. Goodin*, 74 Ga. App. 468, 40 S.E.2d 214 (1946); *Avary v. Avary*, 202 Ga. 22, 41 S.E.2d 314 (1947); *Parnell v.*

Wooten, 202 Ga. 443, 43 S.E.2d 673 (1947); *Redmond v. Sinclair Ref. Co.*, 204 Ga. 699, 51 S.E.2d 409 (1949); *Gaither v. Gaither*, 206 Ga. 808, 58 S.E.2d 834 (1950); *Salter v. Salter*, 209 Ga. 90, 70 S.E.2d 453 (1952); *Rountree v. Davis*, 90 Ga. App. 223, 82 S.E.2d 716 (1954); *Collins v. Dacus*, 211 Ga. 779, 89 S.E.2d 198 (1955); *Johnson v. Wilson*, 212 Ga. 264, 91 S.E.2d 758 (1956); *Lowry v. Rosenfeld*, 213 Ga. 578, 100 S.E.2d 447 (1957); *Ramsey v. Womack*, 214 Ga. 722, 107 S.E.2d 180 (1959); *Claxton v. Claxton*, 214 Ga. 715, 107 S.E.2d 320 (1959); *Brewton v. McLeod*, 216 Ga. 686, 119 S.E.2d 105 (1961); *Wright v. Florida-Georgia Tractor Co.*, 218 Ga. 824, 130 S.E.2d 736 (1963); *Stith v. Willis*, 219 Ga. 62, 131 S.E.2d 620 (1963); *Simmons v. Watson*, 221 Ga. 765, 147 S.E.2d 322 (1966); *Harp v. Bacon*, 222 Ga. 478, 150 S.E.2d 655 (1966); *Georgia Power Co. v. City of Macon*, 228 Ga. 641, 187 S.E.2d 262 (1972); *Hill v. L/A Mgt. Corp.*, 234 Ga. 341, 216 S.E.2d 97 (1975); *McArthur v. Southern Airways, Inc.*, 404 F. Supp. 508 (N.D. Ga. 1975); *Gorman v. Gorman*, 239 Ga. 312, 236 S.E.2d 652 (1977); *Department of Natural Resources v. American Cyanamid Co.*, 239 Ga. 740, 238 S.E.2d 886 (1977); *Harper v. Harper*, 241 Ga. 19, 243 S.E.2d 74 (1978); *Head v. Walker*, 243 Ga. 108, 252 S.E.2d 440 (1979).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Equity, §§ 46-51, 248.

C.J.S. — 30 C.J.S., Equity, § 68.

ALR. — Right to protection against simulation of physical appearance or arrangement of place of business or vehicle, 28 ALR 114.

Right under general prayer to relief inconsistent with prayer for specific relief, 30 ALR 1175.

Retention of jurisdiction in suit in equity to determine whole controversy, including amount of loss or damage, after setting aside an award or finding by arbitrators or appraisers, 112 ALR 9.

Right to reformation of contract or instrument as affected by intervening rights of third persons, 79 ALR2d 1180.

23-1-8. Same — Considers done what ought to be done.

Equity considers that done which ought to be done and directs its relief accordingly. (Orig. Code 1863, § 3019; Code 1868, § 3031; Code 1873, § 3086; Code 1882, § 3086; Civil Code 1895, § 3926; Civil Code 1910, § 4523; Code 1933, § 37-106.)

JUDICIAL DECISIONS

Equity treats as done that which in fairness ought to have been done. *United States v. Ferguson*, 409 F. Supp. 393 (S.D. Ga. 1975), *aff'd*, 529 F.2d 999 (5th Cir. 1976).

Since equity considers that done which ought to be done, it is therefore recognized that in order to prevent forfeitures, which are not favored, equity will lay hold upon any expressed intention of an insured to designate an eligible beneficiary, or any inchoate effort to designate a substituted beneficiary in lieu of a deceased one, where death or illness of the insured prevents the filling of such vacancy. *Hewell v. Atlanta Police Relief Ass'n*, 184 Ga. 702, 192 S.E. 828 (1937).

Since equity considers that done which ought to have been done, equity will decree that a child is entitled to the fruits of a legal adoption where the act of formal adoption had not been consummated. *Toler v. Goodin*, 200 Ga. 527, 37 S.E.2d 609 (1946).

This section sets out the general principle on which a court of equity may, in a proper case, allow inheritance under the so-called doctrine of virtual adoption. *Toler v. Goodin*, 200 Ga. 527, 37 S.E.2d 609 (1946).

Where the plaintiffs are alleged to constitute the sole survivors of the class which could be designated as beneficiaries of the defendant relief association, and for whose benefit the certificate was taken out and maintained, equity in the exercise of its jurisdiction will account that done which ought to have been done if opportunity had been given, and in order to avoid a forfeiture will treat such children, the plaintiffs, as being in good conscience as much as the actual beneficiaries under the certificate as if the insured father had been afforded opportunity to name and had actually named them as such. *Hewell v. Atlanta Police Relief Ass'n*, 184 Ga. 702, 192 S.E. 828 (1937).

Despite the death of the party against whom relief is sought, equity will grant relief and decree that to be done which ought to have been done. *Holsomback v. Caldwell*, 218 Ga. 393, 128 S.E.2d 47 (1962).

Where to a proceeding to foreclose a deed to secure debt as an equitable mortgage, which prays for judgment for principal, interest, and attorney's fees, a debtor files a plea in which it is alleged that the petitioner held as collateral fire insurance policies with a loss-payable clause in favor of the petitioner aggregating more than the amount of the debt, which had become due and payable as the result of a fire some months before there was a default on the debt, and that the insurance could have been collected at any time, but was not collected due solely to the negligence of the petitioner who had made no demand for payment, and that the attorney's fees sought in the foreclosure proceeding would have been unnecessary had such collection been made, such plea alleged facts sufficient to show a breach of duty, both in law and in equity, upon the part of the creditor, which would prevent it from collecting attorney's fees and deny the creditor any relief in equity. *Irwin v. Life & Cas. Ins. Co.*, 204 Ga. 582, 50 S.E.2d 354 (1948).

Even though an appointment may have been made to an office where the term of the incumbent has not expired, and in pursuance of the order of appointment the incumbent has been forcibly removed from the room or quarters of his office and thereby deprived of the opportunity of exercising the duties of the office, such incumbent will in equity continue to be treated as the incumbent for the purpose of protecting him in his right to function as such official, pending a judicial determination of the validity of such appointment. *Partain v. Maddox*, 227 Ga. 623, 182 S.E.2d 450 (1971).

The court considers as actually having been performed acts which have been directed or which have agreed or intended to be done. Thus, an agreement to give security may, in a proper case, be deemed to have been executed by the giving of security. *United States v. Ferguson*, 409 F. Supp. 393 (S.D. Ga. 1975), *aff'd*, 529 F.2d 999 (5th Cir. 1976).

There may be valid contract to adopt without the express use of term "adopt" in contract. *Toler v. Goodin*, 200 Ga. 527, 37 S.E.2d 609 (1946).

Language clearly showing intent to effect an adoption according to the law, considered under the attendant and surrounding circumstances though not containing precise legal phraseology, is sufficient to create a virtual adoption. *Toler v. Goodin*, 200 Ga. 527, 37 S.E.2d 609 (1946).

An oral agreement to adopt may be shown by the acts, conduct, and admissions of the parties, and in order to establish such a contract, the exact word "adopt" need not be used. *Toler v. Goodin*, 200 Ga. 527, 37 S.E.2d 609 (1946).

In a case of virtual adoption the alleged agreement must be proved so clearly, strongly, and satisfactorily as to leave no reasonable doubt in the minds of the jury. *Toler v. Goodin*, 200 Ga. 527, 37 S.E.2d 609 (1946).

An authenticated copy of an application of the parent for a homestead which contained the following question and answer, "If married, of whom does your family consist?" "My wife and adopted daughter and myself," was relevant in an action to prove a virtual adoption as illustrating whether there had been a contract to adopt the child, since it indicates that the child was living with the parents at that time. *Toler v. Goodin*, 200 Ga. 527, 37 S.E.2d 609 (1946).

A parol obligation of a person to adopt the child of another as his own,

accompanied by a virtual though not a statutory adoption, and acted upon by all parties concerned for many years and during the obligor's life, may be enforced in equity upon the death of the obligor by decreeing the child entitled as a child to the property of the obligor, undisposed of by will. *Toler v. Goodin*, 200 Ga. 527, 37 S.E.2d 609 (1946).

An agreement by a married couple that if the natural parent would relinquish all claims of all nature to his child the couple would adopt the child as their own, would love her and provide for her fully all things essential to her welfare, and make her heir to inherit at their death as if she had been their natural child, is sufficient to create a contract of adoption. *Toler v. Goodin*, 200 Ga. 527, 37 S.E.2d 609 (1946).

Cited in *Gilford v. Green*, 33 Ga. App. 1, 125 S.E. 80 (1924); *Richards v. Plaza Hotel, Inc.*, 171 Ga. 827, 156 S.E. 809 (1931); *Rowe v. Cole*, 176 Ga. 592, 168 S.E. 882 (1933); *Biddle v. Papa*, 180 Ga. 468, 179 S.E. 357 (1935); *Rose v. Crane Heating Co.*, 198 Ga. 295, 31 S.E.2d 717 (1944); *Shaw v. Miller*, 215 Ga. 413, 110 S.E.2d 759 (1959); *Bair v. Willis*, 218 Ga. 563, 129 S.E.2d 774 (1963); *Stith v. Willis*, 219 Ga. 62, 131 S.E.2d 620 (1963); *Jordan Co. v. Bethlehem Steel Corp.*, 309 F. Supp. 148 (S.D. Ga. 1970); *McArthur v. Southern Airways, Inc.*, 404 F. Supp. 508 (N.D. Ga. 1975).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Equity, § 126.

C.J.S. — 30 C.J.S., Equity, § 106.

ALR. — Constitutionality of statute conferring on chancery courts power to abate public nuisance, 22 ALR 542; 75 ALR 1298.

Power of equity in absence of statute to render deficiency judgment in foreclosure action, 34 ALR 1015.

Validity and enforceability of restrictive covenants in contracts of employment, 52

ALR 1362; 67 ALR 1002; 98 ALR 964.

Doctrine of equitable conversion in relation to taxation, 112 ALR 23.

Right to reformation of contract or instrument as affected by intervening rights of third persons, 79 ALR2d 1180.

Rule denying recovery of property to one who conveyed to defraud creditors as applicable where claim which motivated the conveyance was never established, 6 ALR4th 862.

23-1-9. Same — Is equality.

In many cases, equality is equity in the distribution of equitable assets. (Orig. Code 1863, § 3023; Code 1868, § 3035; Code 1873, § 3090; Code 1882, § 3090; Civil Code 1895, § 3930; Civil Code 1910, § 4527; Code 1933, § 37-110.)

Law reviews. — For note, "Georgia Becomes A Quasi Community Property State," see 17 Ga. St. B.J. 134 (1981).

JUDICIAL DECISIONS

Cited in Trust Co. v. Kenny, 188 Ga. 243, 3 S.E.2d 553 (1939).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Equity, § 125.

C.J.S. — 30 C.J.S., Equity, § 109.

23-1-10. Who would have equity must do equity.

He who would have equity must do equity and must give effect to all equitable rights of the other party respecting the subject matter of the action. (Orig. Code 1863, § 3017; Code 1868, § 3029; Code 1873, § 3084; Code 1882, § 3084; Civil Code 1895, § 3924; Civil Code 1910, § 4521; Code 1933, § 37-104.)

Law reviews. — For article discussing the historical background of the doctrine of tender and the application in Georgia of tender requirements, and proposing reforms, see 21 Mercer L. Rev. 413 (1969).

For article discussing application of the principle that he who would have equity must do equity to taxpayer's suits, see 7 Ga. St. B.J. 305 (1971).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
JURISDICTION
PLEADING AND PRACTICE

General Consideration

The equitable maxim which is embodied in this section is a favorite maxim in equity. *Duke v. Ayers*, 163 Ga. 444, 136 S.E. 410 (1927); *Autry v. Southern Ry.*, 167 Ga. 136, 144 S.E. 741 (1928).

This section contains one of the oldest and best settled and most familiar maxims in equity. It is applicable in every type of case, including unfair competition. *Eastman Kodak Co. v. Fotomat Corp.*, 317 F. Supp. 304 (N.D. Ga. 1969), appeal dismissed, 441 F.2d 1079 (5th Cir. 1971).

This section is the basis for the "clean hands" doctrine. *Partain v. Maddox*, 227 Ga. 623, 182 S.E.2d 450 (1971).

He who comes into a court of equity with unclean hands must be denied relief. *Musgrove v. Musgrove*, 213 Ga. 610, 100 S.E.2d 577 (1957).

One will not be permitted to take advantage of his own wrong. *Musgrove v. Musgrove*, 213 Ga. 610, 100 S.E.2d 577 (1957).

Where owners of property abutting upon streets attack an assessment, only on the ground that it is excessive, they should pay or offer to pay what they admit to be due. *City of Camilla v. Cochran*, 160 Ga. 424, 128 S.E. 179 (1925).

This section requires that anyone going into a court and asking its aid shall submit himself to the jurisdiction of the court and subject himself to the imposition of such terms as well established equitable principles would require. *Charleston & W.C. Ry. v. Hughes*, 105 Ga. 1, 30 S.E. 972, 70 Am. St. R. 17 (1898).

Where one cotenant comes into equity and seeks its aid to enforce his title, equity, in decreeing the relief, will require him to account for the improvements. *Holland Furnace Co. v. Lowe*, 172 Ga. 815, 159 S.E. 277 (1931).

As a general rule, equity will not grant relief to a party who comes into court with unclean hands, or is guilty of an illegal or immoral act, nor aid a grantor or his administrator in seeking to cancel a security deed which was executed by him for the purpose of hindering, delaying or defrauding creditors; these rules stem from the just and salutary principle that one will not be permitted to profit by his own wrong, and apply where a party is seeking the aid of equity in the enforcement of executory contracts or its aid under an executed contract. *Fuller v. Fuller*, 211 Ga. 201, 84 S.E.2d 665 (1954).

One with unclean hands cannot obtain relief in equity. *Morgan v. Wright*, 219 Ga. 385, 133 S.E.2d 341 (1963).

The deliberate attempt to take another man's wife from him, and entering into an engagement with her to marry at a time when she could not lawfully marry, and giving a ring to further such an unlawful engagement is a defiance of public policy and constitutes the rankest sort of unclean hands. *Morgan v. Wright*, 219 Ga. 385, 133 S.E.2d 341 (1963).

Equity may declare a trust to exist under the circumstances specified in this section, but will not do so at the insistence of a party who lacks clean hands with respect to those matters concerning which he seeks relief. *Griggs v. Griggs*, 242 Ga. 96, 249 S.E.2d 566 (1978).

This principle is applicable where one in an equity suit seeks both legal and equitable relief. One who avails himself of an equitable remedy is as much bound by this principle as one who is asserting in such a court a purely equitable right. *Wilder v. City of Atlanta*, 40 Ga. App. 364, 149 S.E. 656 (1929); *Snell v. Spalding Foundry Co.*, 180 Ga. 582, 180 S.E. 218 (1935); *Wright v. City of Metter*, 192 Ga. 75, 14 S.E.2d 443 (1941).

He who would have equity must do equity, and give effect to all equitable rights in the other party respecting the subject matter of the suit. And this principle is applicable where one in an equity suit seeks both legal and equitable relief. *Bass v. Mayor of Milledgeville*, 180 Ga. 156, 178 S.E. 529 (1934), appeal dismissed, 295 U.S. 721, 55 S. Ct. 926, 79 L. Ed. 1695 (1935).

The rule that he who would have equity must do equity refers to equitable rights respecting the subject matter of the action; it does not embrace outside matters. *Atlanta Ass'n of Fire Ins. Agents v. McDonald*, 181 Ga. 105, 181 S.E. 822 (1935).

The unclean hands maxim which bars a complainant in equity from obtaining relief has reference to an inequity which inflects the cause of action so that to entertain it would be violative of conscience; it must relate directly to the transaction concerning which complaint is made. *Atlanta Ass'n of Fire Ins. Agents v. McDonald*, 181 Ga. 105, 181 S.E. 822 (1935).

The rule that equity refuses to interfere where both parties are at fault does not apply when the faults are unequal. *Atlanta Ass'n of Fire Ins. Agents v. McDonald*, 181 Ga. 105, 181 S.E. 822 (1935).

An inequity that causes the invocation of the "clean hands" rule must relate directly to the transaction concerning which complaint is made. The rule refers to equitable rights respecting the subject matter of the action, and it does not embrace outside matters. *Partain v. Maddox*, 227 Ga. 623, 182 S.E.2d 450 (1971).

Where a constitutional officer's previous act in complying with the Governor's demand for an undated resignation letter is unrelated to the relief sought in a judicial action seeking rightful possession of the constitutional office, no unclean hands are involved. *Partain v. Maddox*, 227 Ga. 623, 182 S.E.2d 450 (1971).

Cited in *Mayor of Montezuma v. Brown*, 168 Ga. 1, 147 S.E. 80 (1929); *Sheffield v. Preacher*, 175 Ga. 719, 165 S.E. 742 (1932); *Chapman v. McPherson*, 177 Ga. 471, 170 S.E. 481 (1933); *Shepard v. Veal*, 178 Ga. 535, 173 S.E. 644 (1934); *Stephens v. National Life Ins. Co.*, 179 Ga. 619, 176

S.E. 772 (1934); *Gulf Oil Corp. v. Suburban Realty Co.*, 183 Ga. 847, 190 S.E. 179 (1937); *Lee v. O'Quinn*, 184 Ga. 44, 190 S.E. 564 (1937); *Cooper v. Peevy*, 185 Ga. 805, 196 S.E. 705 (1938); *Aiken v. Armistead*, 186 Ga. 368, 198 S.E. 237 (1938); *Bowers v. Dolen*, 187 Ga. 653, 1 S.E.2d 734 (1939); *Harton v. Federal Land Bank*, 187 Ga. 700, 2 S.E.2d 62 (1939); *Interstate Bond Co. v. Cullars*, 189 Ga. 283, 3 S.E.2d 756 (1939); *Aven v. Steiner Cancer Hosp.*, 189 Ga. 126, 5 S.E.2d 356 (1939); *Fulmore v. Macon Fed. Savs. & Loan Ass'n*, 191 Ga. 151, 11 S.E.2d 790 (1940); *Georgia Baptist Orphans Home, Inc. v. Moon*, 192 Ga. 81, 14 S.E.2d 590 (1941); *McMullen v. Carlton*, 192 Ga. 282, 14 S.E.2d 719 (1941); *Tanner v. Wilson*, 193 Ga. 211, 17 S.E.2d 581 (1941); *Behr v. City of Macon*, 194 Ga. 334, 21 S.E.2d 169 (1942); *Bray v. Malcolm*, 194 Ga. 593, 22 S.E.2d 126 (1942); *Raines v. Shipley*, 197 Ga. 448, 29 S.E.2d 588 (1944); *Allen v. Allen*, 198 Ga. 269, 31 S.E.2d 483 (1944); *Doolittle v. Bagwell*, 199 Ga. 155, 33 S.E.2d 437 (1945); *Jackson v. Jackson*, 202 Ga. 634, 44 S.E.2d 250 (1947); *Puckett v. Reese*, 203 Ga. 716, 48 S.E.2d 297 (1948); *Allen v. Wade*, 203 Ga. 753, 48 S.E.2d 538 (1948); *Reardon v. Bland*, 206 Ga. 633, 58 S.E.2d 377 (1950); *Vinson v. Citizens & S. Nat'l Bank*, 208 Ga. 813, 69 S.E.2d 866 (1952); *Carter v. City of Toccoa*, 210 Ga. 167, 78 S.E.2d 487 (1953); *Payne v. Jones*, 211 Ga. 322, 86 S.E.2d 3 (1955); *Miron Motel, Inc. v. Smith*, 211 Ga. 864, 89 S.E.2d 643 (1955); *Miller v. Levenson*, 212 Ga. 496, 93 S.E.2d 753 (1956); *Hardy v. Savannah Apts., Inc.*, 217 F. Supp. 649 (S.D. Ga. 1962); *Pearl Optical, Inc. v. Pearle Optical of Ga., Inc.*, 218 Ga. 701, 130 S.E.2d 223 (1963); *Williamson v. Cullom*, 218 Ga. 740, 130 S.E.2d 715 (1963); *Derrick v. Campbell*, 219 Ga. 795, 136 S.E.2d 381 (1964); *Walker v. Burns*, 220 Ga. 467, 139 S.E.2d 389 (1964); *Budreau v. Crawford*, 222 Ga. 716, 152 S.E.2d 398 (1966); *Straughan v. Brown*, 223 Ga. 592, 157 S.E.2d 256 (1967); *Hall v. Heard*, 223 Ga. 659, 157 S.E.2d 445 (1967); *Cowart v. Gay*, 223 Ga. 635, 157 S.E.2d 466 (1967); *O'Kelley v. Evans*, 224 Ga. 49, 159 S.E.2d 418 (1968); *Holcomb v. Approved Bancredit Corp.*, 225 Ga. 271, 167 S.E.2d 655 (1969); *Bloodworth v. Bloodworth*,

225 Ga. 379, 169 S.E.2d 150 (1969); Kiker v. Hefner, 409 F.2d 1067 (5th Cir. 1969); Harding v. City of Decatur, 226 Ga. 474, 175 S.E.2d 507 (1970); Harper v. Harper, 229 Ga. 583, 193 S.E.2d 616 (1972); Adams v. Smith, 129 Ga. App. 850, 201 S.E.2d 639 (1973); Berry v. Government Nat'l Mtg. Ass'n, 231 Ga. 503, 202 S.E.2d 450 (1973); Hill v. L/A Mgt. Corp., 234 Ga. 341, 216 S.E.2d 97 (1975); McArthur v. Southern Airways, Inc., 404 F. Supp. 508 (N.D. Ga. 1975); Wright v. Intercounty Properties, Ltd., 238 Ga. 492, 233 S.E.2d 160 (1977); First Nat'l Bank v. Blum, 141 Ga. App. 485, 233 S.E.2d 835 (1977); Williams v. Whitfield, 242 Ga. 639, 250 S.E.2d 486 (1978); Sapp v. ABC Credit & Inv. Co., 243 Ga. 151, 253 S.E.2d 82 (1979); Bloodworth v. Sandersville Prod. Credit Ass'n, 245 Ga. 40, 262 S.E.2d 804 (1980).

Jurisdiction

Jurisdiction. — Suits in equity shall be tried in the county where a defendant resides against whom substantial relief is prayed; and he who would have equity must do equity, hence equity, having the parties before the court rightfully, will proceed to give full relief to all parties in reference to the subject matter provided the court has jurisdiction thereof. Pearson v. George, 211 Ga. 18, 83 S.E.2d 593 (1954).

This section has no relation to the subject matter of a suit to cancel a judgment for alimony that is void for want of jurisdiction, and under which judgment the former wife has no equitable rights to which the former husband should give effect. Gaither v. Gaither, 205 Ga. 572, 54 S.E.2d 600 (1949).

Pleading and Practice

Section applicable where both legal and equitable relief sought. — The principle established by this section is as well applicable where one in an equity suit seeks both legal and equitable relief, as where he seeks a purely equitable right. Montgomery v. City of Atlanta, 162 Ga. 534, 134 S.E. 152 (1926).

A plaintiff cannot come into equity without first paying or tendering any amount admitted to be due. Pass v. Pass, 195 Ga. 155, 23 S.E.2d 697 (1942).

Before equity will hearken unto a suitor's prayer for equitable relief, he must offer to do full and complete equity to his adversary. Renfroe v. Butts, 192 Ga. 720, 16 S.E.2d 551 (1941).

A party is not obliged to return that which he will be entitled to retain, as a condition to a cancellation; so, if a plaintiff has received no more than he was entitled to, his offer to account for the same in adjustment of the differences between the parties sufficiently meets the requirement that he who seeks equity must do equity. Smith v. Merck, 206 Ga. 361, 57 S.E.2d 326 (1950).

The mere untimely payment of premiums, standing alone, when such untimely payments were accepted by the insurer would not constitute a failure "to do equity." Continental Cas. Co. v. Union Camp Corp., 230 Ga. 8, 195 S.E.2d 417 (1973).

Equity refuses to aid any suitor who fails to do equity to the opposite party respecting the subject matter of the suit. Irwin v. Life & Cas. Ins. Co., 204 Ga. 582, 50 S.E.2d 354 (1948).

But if the fault of one decidedly overbalances the other, equity may interfere. Atlanta Ass'n of Fire Ins. Agents v. McDonald, 181 Ga. 105, 181 S.E. 822 (1935).

In order to do equity, a plaintiff is not obliged to return that which he will be entitled to retain. Dumas v. Dumas, 206 Ga. 767, 58 S.E.2d 830 (1950).

The defendant should not be compelled to perform unless he receives the agreed exchange which is a condition of his performance under the contract. Krauth v. Bagley, 243 Ga. 87, 252 S.E.2d 504 (1979).

Equity will not decree the cancellation of an instrument where anything of value has been received until repayment is either made or tendered, or the defendant has stated that, should a tender be made, it would be refused. Wilson v. McAtter, 206 Ga. 835, 59 S.E.2d 252 (1950).

Where the plaintiff is seeking affirmative relief in a court of equity, he cannot have the relief sought without observing the equities of the transaction. Atlanta Banking & Sav. Co. v. Johnson, 179 Ga. 313, 175 S.E. 904 (1934).

A party seeking specific performance of a contract must show substantial compliance with his part of the agreement in order to be entitled to a decree. *Kirk v. First Ga. Inv. Corp.*, 239 Ga. 171, 236 S.E.2d 254 (1977).

Where the plaintiff is not in default when he files suit, the occurrence of a subsequent default of the plaintiff is not by itself a sufficient reason for denying specific performance. *Jordan v. Flynt*, 240 Ga. 359, 240 S.E.2d 858 (1977).

Pursuant to the basic principle of equity, in this section a borrower who has executed a deed to secure debt is not entitled to an injunction against a sale of the property under a power in the deed, unless he first pays or tenders to the creditor the amount admittedly due. This is true notwithstanding any allegation that the defendant has breached some independent covenant. *Bower v. Certain-Teed Prod. Corp.*, 216 Ga. 646, 119 S.E.2d 5 (1961); *Wright v. Intercounty Properties, Ltd.*, 238 Ga. 492, 233 S.E.2d 160 (1977); *P.B.R. Enterprises, Inc. v. Perren*, 243 Ga. 280, 253 S.E.2d 765 (1979).

Where one brings a petition in equity seeking to enjoin a sale under a power of sale contained in a security deed, which deed contains an acceleration clause, alleging as ground for injunction that he is entitled to a credit on the indebtedness secured thereby, "and that the proper application of said credit will liquidate all of the installments claimed to be in arrears, leaving nothing past due on said indebtedness," and where, on interlocutory hearing, it appears from the evidence that upon proper application of the alleged credit there would still be a considerable amount past due, and there is no offer to pay or tender to the grantee in the security deed of the amounts due thereunder, it is not error for the judge to refuse to grant an injunction. *Brinson v. Federal Land Bank*, 182 Ga. 477, 185 S.E. 828 (1936).

Before an instrument can be canceled the benefits received thereunder must be returned or tendered to the opposite party. *Brooks v. Southern Clays, Inc.*, 220 Ga. 152, 137 S.E.2d 630 (1964).

Before a borrower who has executed to the same grantee two deeds to secure debts can have affirmative equitable relief to set

aside a sale by the creditor under exercise of the power of sale contained in the deeds, and an injunction against the creditor and the persons claiming under him to prevent interference with the debtor's possession of a portion of the property, such debtor must pay or tender to the creditor the principal and interest which he admits to be due, and would not be relieved of this duty by reason of the fact that the creditor was demanding of him more than he owed. *Harpe v. Stone*, 212 Ga. 341, 92 S.E.2d 522 (1956).

Before one who has given a deed to secure his debt can have set aside in equity a sale by the creditor in exercise of the power conferred by the deed, and injunction to prevent interference with the debtor's possession of the property conveyed by the deed, he must pay or tender to the creditor the amount of principal and interest due. *Coile v. Finance Co. of America*, 221 Ga. 584, 146 S.E.2d 304 (1965).

In order to enable plaintiffs to come into equity it is essential in the first instance that they should have paid or tendered the amount admitted to be due. Failure to pay or tender to the defendant the full amount before filing the petition stands as a bar to any of the relief sought, and the defect is fatal to the further prosecution of the action. *State Mut. Ins. Co. v. Strickland*, 218 Ga. 94, 126 S.E.2d 683 (1962).

One seeking to enjoin the enforcement of an execution, on the ground that usury has been computed thereon, must first offer to pay the amount admitted or shown to be due, before a court of equity would intervene in his behalf. *Sharpe v. City of Waycross*, 185 Ga. 208, 194 S.E. 522 (1937).

Before a borrower, who has executed a deed infected with usury, can have affirmative equitable relief, such as injunction to prevent exercise of the power of sale by the grantee in such security deed, he must pay or tender to the grantee the principal sum due. *I.D.S. Homes Corp. v. Lucas*, 228 Ga. 521, 186 S.E.2d 745 (1972).

Under application of this maxim, before a borrower who has executed a deed to secure a debt can have affirmative equitable relief such as the setting aside of a sale by the creditor under exercise of a power contained in a security deed, and injunction against the creditor and persons

claiming under him, to prevent interference with the debtor's possession of the property, such debtor must pay or tender to the creditor the principal and interest due. *Biggers v. Home Bldg. & Loan Ass'n*, 179 Ga. 429, 176 S.E. 38 (1934); *Redwine v. Frizzell*, 184 Ga. 230, 190 S.E. 789 (1937).

An offer to restore whatever of value one has received under a contract is a condition precedent to bringing an action for cancellation or rescission of the contract, and such tender must be made before such action is commenced. *Dimmick v. Pullen*, 224 Ga. 452, 162 S.E.2d 427 (1968).

A borrower who has executed a deed to secure debt is not entitled to an injunction against a sale of the property under a power in the deed, unless he first pays or tenders to the creditor the amount admittedly due. The same rule applies where one standing in the place of the borrower seeks an injunction to prevent a transferee or assignee of such deed from selling the property for the purpose of satisfying the secured debt. *Crockett v. Oliver*, 218 Ga. 620, 129 S.E.2d 806 (1963).

A tender of the past due payments under indebtedness evidenced by deeds to secure debt must be made where a complainant seeks the aid of equity in setting aside and cancelling a deed under a foreclosure sale. *Keith v. Yarbrough*, 231 Ga. 770, 204 S.E.2d 111 (1974).

Where a municipality makes proof of its claim to the superintendent of banks (now commissioner of banking and finance) on the basis of a creditor and obtains from the superintendent of banks one or more dividends on an equal basis with general depositors, before the municipality would be authorized to come into equity seeking to declare an implied trust to be impressed upon the general funds remaining in the hands of the superintendent of banks and priority over general depositors in the distribution of such funds, it would be necessary for the municipality to do equity by returning such portion of the dividends received by it as were derived from assessments against stockholders. *Town of Douglasville v. Mobley*, 169 Ga. 53, 149 S.E. 575 (1929).

Where a petition seeking to enjoin the enforcement of a paving assessment execu-

tion of the ground of dormancy shows on its face, as a matter of law, that a portion of such execution has not become dormant and is still due and unpaid, such petition fails to set forth a cause of action for the relief sought, in the absence of any tender or offer to pay the sums shown to be due. *Sharpe v. City of Waycross*, 185 Ga. 208, 194 S.E. 522 (1937).

In a suit by plaintiff-debtor seeking cancellation of a note and security deed, the failure to offer payment or tender of the balance due on the loan or to offer any excuse for not doing so brings the plaintiff under the provisions of this section. *Coile v. Finance Co. of America*, 221 Ga. 584, 146 S.E.2d 304 (1965).

One seeking equitable relief from the enforcement of a tax execution based upon an assessment allegedly excessive, or for other cause, but admitting, as here, that he owes a part of the tax covered by such execution, must, prior to the institution of an equitable action for cancellation and injunction, pay or offer to pay the amount of taxes admitted to be due, in order to obtain the relief sought. An allegation that one is "ready and willing to pay" an amount of tax admitted to be due is not an "offer" to pay as required by law. *Zugar v. Scarbrough*, 186 Ga. 310, 197 S.E. 854 (1938); *Holloway v. De Vane*, 212 Ga. 182, 91 S.E.2d 350 (1956).

One seeking relief from excessive tax levies, but admitting, either expressly or by necessary implication, that he owes part of the tax covered by such executions, must pay or offer to pay the amount of the taxes admitted to be due, in order to obtain the relief sought. *Pierce Trading Co. v. City of Blackshear*, 182 Ga. 649, 186 S.E. 721 (1936); *Elder v. Home Bldg. & Loan Ass'n*, 185 Ga. 258, 194 S.E. 745 (1937); *Clisby v. City of Macon*, 191 Ga. 749, 13 S.E.2d 772 (1941); *Kiker v. Hefner*, 224 Ga. 511, 162 S.E.2d 731 (1968); *Adcock v. Sutton*, 224 Ga. 505, 162 S.E.2d 732 (1968); *Allen v. Thomas*, 225 Ga. 650, 171 S.E.2d 132 (1969).

Where there is no allegation in a petition that property owners have paid or offered to pay the city any amount as the taxes due on the property, the owners are for such failure in no position to apply to a court of equity to enjoin the city from selling their

property under executions for taxes due. *Smith v. City of E. Ellijay*, 217 Ga. 364, 122 S.E.2d 112 (1961).

Petition seeking an injunction either to restrain tax sales or to prevent a continuation of the alleged discriminatory assessment practice, was fatally defective for its failure to allege a tender at least of the amounts which would have been due by the plaintiffs as taxes if their real estate had been assessed for taxation at the lowest basis of value applied to the more favorably treated personalty. *Mayor of Savannah v. Fawcett*, 186 Ga. 132, 197 S.E. 253 (1938).

A tax sale that is not specifically attacked on the ground that the levy of the execution was excessive, but is attacked on the ground that the sheriff failed to sell the realty levied on according to the advertisement of sale, which recited that so much of the realty levied on would be sold as was sufficient to satisfy the executions, and instead sold the realty in bulk although the realty was capable of subdivision into lots or tracts less than the whole which could have been sold for the amount of the executions, would not prevent the application of this equitable principle. *Durham v. Smith*, 186 Ga. 565, 198 S.E. 734 (1938).

Where a taxpayer makes a tax return of property subject to ad valorem tax, he admits that there is a liability for taxes on the property returned and he must pay or offer to pay the amount of taxes admitted to be due, in order to obtain the relief from overassessment. *Trust Inv. & Dev. Co. v. City of Marietta*, 216 Ga. 788, 119 S.E.2d 568 (1961).

Where a taxpayer seeks to prevent the collection of an ad valorem tax, and he admits, either expressly or impliedly, that he is liable for at least a part of the tax sought to be collected he must first pay or offer to pay the amount of the tax legally due, before enjoining its collection. *Freeman v. Keaton*, 223 Ga. 505, 156 S.E.2d 347 (1967).

Those who seek the aid of a court of equity to restrain and enjoin the taxing authorities of a county from collecting or attempting to collect taxes alleged to have been illegally assessed against the property of the petitioners, and alleging in their petition, and thus admitting thereby, that they owe some taxes for the year in question,

must show that they have tendered and offered to pay the amount of taxes in fact due in order to obtain the relief sought. *Freeman v. Keaton*, 223 Ga. 505, 156 S.E.2d 347 (1967).

In suit to cancel a tax deed upon the ground of excessive levy, seeking an accounting as to some of the defendants and general relief as to all of them where it appeared from allegations of the petition that each of the defendants was liable to the plaintiffs for trespass upon the property in a sum greater than the amount of the taxes for which the property was sold, and that the plaintiffs were willing to do equity, the allegations in regard to excessive levy and the prayer for cancellation on that ground were not deficient for failure of the plaintiffs to allege a previous tender of the amount of the taxes. *Zugar v. Scarbrough*, 186 Ga. 310, 197 S.E. 854 (1938).

One who by inheritance succeeds to the interest of such original owner in the property will not be heard in equity when seeking to cancel the deed of the purchaser at such sale, on the ground that the levy was excessive, without paying or offering to pay all unpaid taxes due on said property when the ownership thereon was in the person from whom it was inherited. *Lowe v. City of Atlanta*, 191 Ga. 76, 11 S.E.2d 891 (1940), later appeal, 194 Ga. 317, 21 S.E.2d 171 (1942).

One seeking relief against collection of municipal taxes on the ground of excessiveness of the levies, or for other cause, but admitting, either expressly or by necessary implication, that he owes part of the tax covered by such executions, must pay or offer to pay the amount of the taxes admitted to be due, in order to obtain the relief sought. *Kent v. Mayor of Alamo*, 193 Ga. 445, 18 S.E.2d 769 (1942).

A borrower who has executed a deed to secure a debt is not entitled to an injunction against a sale of the property under a power in the deed, unless he first pays or tenders to the creditor the amount admittedly due. *Oliver v. Slack*, 192 Ga. 7, 14 S.E.2d 593 (1941); *Cook v. Young*, 225 Ga. 26, 165 S.E.2d 727 (1969).

In a suit by a purchaser for specific performance of a contract for the sale of land, it should be made to appear that before institution of the action the plaintiff had

paid or tendered the purchase-money according to the contract, or that tender had been waived by the defendant. *Washington Mfg. Co. v. Wickersham*, 201 Ga. 635, 40 S.E.2d 206 (1946).

Purchaser seeking specific performance of contract of purchase of realty is required under statute to do equity by tendering the amount admittedly due under the contract in order to obtain the relief sought. *Shepard v. Gettys*, 206 Ga. 392, 57 S.E.2d 272 (1950).

Where purchaser seeking performance of contract of purchase of realty offered to do equity by paying the full amount of the purchase price, but the defendant repudiated the contract and declared his intentions not to carry out the contract, defendant's repudiation was a waiver of tender, and under the law relieved the petitioner of any obligation to tender. *Shepard v. Gettys*, 206 Ga. 392, 57 S.E.2d 272 (1950).

Since a defendant is not required to perform under the terms of a contract if the plaintiff is currently in default, specific performance may not be decreed against appellee unless it is conditioned on appellant's curing of any default on his part, but if the decree is so conditioned, this section will be satisfied. *Jordan v. Flynt*, 240 Ga. 359, 240 S.E.2d 858 (1977); *Krauth v. Bagley*, 243 Ga. 87, 252 S.E.2d 504 (1979).

The decree of specific performance is improper where the plaintiff was in default at the time suit was filed, he remains in default at the time of the decree, and the decree of specific performance is not conditional on the plaintiff curing his default. *Jordan v. Flynt*, 240 Ga. 359, 240 S.E.2d 858 (1977).

Where the plaintiff is not in default when he files suit, the occurrence of a subsequent default of the plaintiff is not by itself a sufficient reason for denying specific performance. *Krauth v. Bagley*, 243 Ga. 87, 252 S.E.2d 504 (1979).

Petition for cancellation of deed was not subject to demurrer (now motion to dismiss) because the petitioner failed to tender to the defendant moneys paid for taxes, improvements, interest, and payment on loan, as well as the consideration paid by the defendant to the plaintiff, where the petition alleged that no part of the con-

sideration named in the deed had been paid and that the rent collected by the defendant was enough to have paid the installments and interest due against said property, and there was nothing in the record to indicate that any improvements were made by the defendant, or any taxes paid by him. *Wellborn v. Johnson*, 204 Ga. 389, 50 S.E.2d 16 (1948).

Where vendees of land may have been excused from tendering the correct amount, or any amount, to the vendor before suit for specific performance, this does not relieve them from offering in their pleadings to pay the amount which is due or the amount which might be found due by decree of the court. *Lively v. Munday*, 201 Ga. 409, 40 S.E.2d 62 (1946).

While ordinarily, before one would be entitled to set aside a tax sale on the grounds that the levy under the execution was excessive, he must tender to the purchaser at such sale the amount paid by such purchaser at the sale, no such tender is required where the petition alleges that the purchaser had not paid any part of the amount of its bid to the sheriff. *Bibb County v. Elkan*, 184 Ga. 520, 192 S.E. 7 (1937); *Durham v. Smith*, 186 Ga. 565, 198 S.E. 734 (1938).

Generally equity will not cancel a conveyance under which anything has been received, until repayment is made. An exception to the rule requiring tender is where the petition alleges that the defendant has been in possession, receiving the rents and profits of the premises conveyed, and prays for an accounting therefor by the defendant, and that the correct amount due him be declared and set up. *Harrell v. Burch*, 195 Ga. 96, 23 S.E.2d 434 (1942).

Allegations of a petition that the petitioner's mutual savings and loan association has been unable to ascertain the exact amount that a tax execution should have issued for, and that the taxing authorities of the city have "refused to ascertain the exact amount legally due by" petitioner, when considered in the light of the fact that city contends that the total amount of the execution is the amount "legally due" and that the ascertainment of the amount for which petitioner contends the execution should have issued is a mere matter of mathematical calculation, based upon the

valuation of the property which petitioner admits is legally taxable and the tax rate applicable thereto, do not allege a sufficient reason for the failure of the petitioner to pay or offer to pay the amount admittedly due. *Elder v. Home Bldg. & Loan Ass'n*, 185 Ga. 258, 194 S.E. 745 (1937).

Where to a proceeding to foreclose a deed to secure debt as an equitable mortgage, which prays for judgment for principal, interest, and attorney's fees, a debtor files a plea in which it is alleged that the petitioner held as collateral fire insurance policies with a loss-payable clause in favor of the petitioner aggregating more than the amount of the debt, which had become due and payable as the result of a fire some months before there was a default on the debt, and that the insurance could have been collected at any time, but was not collected due solely to the negligence of the petitioner who had made no demand for payment, and that the attorney's fees sought in the foreclosure proceeding would have been unnecessary had such collection been made, such plea alleged facts sufficient to show a breach of duty, both in law and in equity, upon the part of the creditor, which would prevent it from collecting attorney's fees and deny the creditor any relief in equity. *Irwin v. Life & Cas. Ins. Co.*, 204 Ga. 582, 50 S.E.2d 354 (1948).

Where the creditor has negligently failed to perform its duty, which results in default on the main debt, the resulting injury or additional expense should be paid by the creditor rather than by the debtors. *Irwin v. Life & Cas. Ins. Co.*, 204 Ga. 582, 50 S.E.2d 354 (1948).

As a general rule a petition to a court of equity to cancel a deed as a cloud on the title of the grantor, brought by the

executrices of the grantor's estate, on the basis that it is void as representing a sale by a wife of her separate estate to her husband, for a valuable consideration, without an order of the superior court of her domicile, when there is no offer to return the consideration recited and acknowledged in the deed to have been received, is demurrable (now motion to dismiss), but where it is alleged in an amendment to the petition that the consideration stated in the deed from the wife to the husband has been only partly paid to a stated amount, that the defendant has been in possession of the property so conveyed for a stated number of years, that the rents, issues, and profits for said period are at least a stated amount, and an offer is made to pay the defendant any difference between the consideration actually paid and the rents, issues, and profits, and the petition contains a prayer for general relief as well as for cancellation and injunction, such allegation by amendment is a sufficient compliance with the requirements of this section, and it is not necessary that a formal tender of the consideration stated in the deed be made. *Franklin v. Cruce*, 187 Ga. 58, 200 S.E. 135 (1938).

In suit by wife for injunction against sale of property under deed, if the petition has shown upon its face, either expressly or impliedly, that any part of the purchase-money had been paid by or for the bank, or that any binding obligation for such payment had been made, it may be that the plaintiff could not maintain an action for equitable relief without averring a repayment of the sum or a tender thereof before suit, or alleging some valid reason for her failure to do so. *Deen v. Baxley State Bank*, 192 Ga. 300, 15 S.E.2d 194 (1941).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Equity, §§ 131-135.

C.J.S. — 30 C.J.S., Equity, §§ 90-92.

ALR. — He who comes into equity must come with clean hands, 4 ALR 44.

Right of victim of practical joke to recover against its perpetrator, 9 ALR 364.

Unfitness as affecting right to restoration by mandamus to office from which one has been illegally removed, 36 ALR 508.

Rule that denies remedy in case of an illegal contract as applicable to an action of conversion, replevin, or detinue for property possession of which was obtained by defendant, or by a third person through

whom he claims, as the result of such a contract with the plaintiff or his predecessor in interest, 132 ALR 619.

Rule denying relief to one who conveyed his property to defraud his creditors as applicable where the threatened claim which occasioned the conveyance was paid or was never established, 21 ALR2d 589.

Vendee's liability for use and occupancy of premises, where vendor disaffirms an unenforceable land contract, 49 ALR2d 1169.

Purchaser's misrepresentations as to intended use of real property as ground for vendor's equitable relief from contract and deed, 35 ALR3d 1369.

Rule denying recovery of property to one who conveyed to defraud creditors as applicable where claim which motivated the conveyance was never established, 6 ALR4th 862.

23-1-11. Effect of equal equities; effect of unequal equities.

Where equities are equal, the law shall prevail. If equities are unequal, the superior equity shall prevail. Superior diligence as to time will create such inequality. (Orig. Code 1863, § 3020; Code 1868, § 3032; Code 1873, § 3087; Code 1882, § 3087; Civil Code 1895, § 3927; Civil Code 1910, § 4524; Code 1933, § 37-107.)

JUDICIAL DECISIONS

Cited in *Biddle v. Papa*, 180 Ga. 468, 179 S.E. 357 (1935); *Rose v. Crane Heating Co.*, 198 Ga. 295, 31 S.E.2d 717 (1944); *Jordan*

Co. v. Bethlehem Steel Corp., 309 F. Supp. 148 (S.D. Ga. 1970).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Equity, § 150.

C.J.S. — 30 C.J.S., Equity, §§ 110, 111.

23-1-12. Equity of misled party superior.

The equity of a party who has been misled is superior to that of the person who willfully misleads such party. (Orig. Code 1863, § 3022; Code 1868, § 3034; Code 1873, § 3089; Code 1882, § 3089; Civil Code 1895, § 3929; Civil Code 1910, § 4526; Code 1933, § 37-109.)

JUDICIAL DECISIONS

Cited in *Frye v. Sims*, 144 Ga. 74, 86 S.E. 249 (1915); *Brown v. Brown*, 209 Ga. 620,

75 S.E.2d 13 (1953); *Levy v. Empire Ins. Co.*, 379 F.2d 860 (5th Cir. 1967).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Equity, § 20. **ALR.** — Right of victim of practical joke to recover against its perpetrator, 9 ALR 364.

C.J.S. — 30 C.J.S., Equity, § 48 et seq.

23-1-13. Volunteer’s equity inferior.

The equity under trust or contract for value is superior to that of a mere volunteer. (Orig. Code 1863, § 3021; Code 1868, § 3033; Code 1873, § 3088; Code 1882, § 3088; Civil Code 1895, § 3928; Civil Code 1910, § 4525; Code 1933, § 37-108.)

JUDICIAL DECISIONS

A donee claiming land under a deed of gift stands in the shoes of her grantor. Cited in Payton v. Payton, 148 Ga. 486, 97 S.E. 69 (1918); Cain v. Varnadore, 171 Ga. 497, 156 S.E. 216 (1930).

Hughes v. Cobb, 195 Ga. 213, 23 S.E.2d 701 (1942).

RESEARCH REFERENCES

C.J.S. — 30 C.J.S., Equity, § 89. **ALR.** — Relaxation of common-law rule regarding recovery of voluntary payment, 75 ALR 658.

Right to reformation of contract or instrument as affected by intervening rights of third persons, 79 ALR2d 1180.

23-1-14. Who bears loss from act of third party.

When one of two innocent persons must suffer by the act of a third person, he who put it in the power of the third person to inflict the injury shall bear the loss. (Civil Code 1895, § 3940; Civil Code 1910, § 4537; Code 1933, § 37-113.)

History of section. — The language of this section is derived in part from the decision in Blaisdell v. Bohr, 77 Ga. 381 (1886).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
FRAUD GENERALLY
EQUITABLE ESTOPPEL

General Consideration

This section is limited in its application to cases in which the party chargeable makes the third party his real or apparent agent, cases in which he provides the means intentionally, or for a dishonest purpose, or negligently, and cases in which he derives a benefit from the fraud of the third party. *Nowell v. Mayor of Monroe*, 177 Ga. 648, 171 S.E. 136, answer conformed to, 47 Ga. App. 665, 171 S.E. 143 (1933).

This section does not govern the great majority of cases where one innocently, for an honest purpose and with reasonable care, furnishes to a third party the means by which he perpetrates a fraud from which he who provides the means derives no benefit. *Nowell v. Mayor of Monroe*, 177 Ga. 648, 171 S.E. 136 (1933).

This section does not apply where no fault or negligence is imputable to the party sought to be held thereby. *Nowell v. Mayor of Monroe*, 177 Ga. 648, 171 S.E. 136, answer conformed to, 47 Ga. App. 665, 171 S.E. 143 (1933).

Liability generally. — As between one of two innocent parties who must suffer from a fraud of a third, he who furnished the means to commit the fraud, or whose negligence enables the third party to commit it, must bear the loss. *McDonald v. Peoples Auto. Loan & Fin. Corp.*, 115 Ga. App. 483, 154 S.E.2d 886 (1967).

Where one of two innocent persons must bear a loss, the one who occasioned it or his representative cannot obtain affirmative relief in a court for the purpose of placing the loss upon the other party, who was equally innocent. *Atlanta Banking & Sav. Co. v. Johnson*, 179 Ga. 313, 175 S.E. 904 (1934).

When a loss must be suffered which results from the acts of one of two people, i.e., the act of the owner in delivering a stock power signed in blank, and the act of

the corporate officers in accepting from the broker an unauthorized power, it must fall upon him who first trusted the defaulting broker. *Frye v. Commonwealth Inv. Co.*, 107 Ga. App. 739, 131 S.E.2d 569, aff'd, 219 Ga. 498, 134 S.E.2d 39 (1963).

The law does not afford relief to one who suffers by not using the ordinary means of information that may be at hand, whether his neglect be due to indifference or credulity. *Braselton Bros. v. Better Maid Dairy Prods., Inc.*, 113 Ga. App. 382, 148 S.E.2d 71, rev'd on other grounds, 222 Ga. 472, 150 S.E.2d 620 (1966).

Cited in *Milner v. First Nat'l Bank*, 38 Ga. App. 668, 145 S.E. 101 (1928); *Moseley v. Phoenix Mut. Life Ins. Co.*, 167 Ga. 491, 145 S.E. 877 (1928); *Anchor Duck Mills v. Harp*, 40 Ga. App. 563, 150 S.E. 572 (1929); *Skinner v. Stewart Plumbing Co.*, 42 Ga. App. 42, 155 S.E. 97 (1930); *Lilly v. Citizens' Bank & Trust Co.*, 44 Ga. App. 653, 162 S.E. 639 (1932); *Nowell v. Mayor of Monroe*, 177 Ga. 648, 171 S.E. 136 (1933); *Capital Auto. Co. v. Ward*, 54 Ga. App. 873, 189 S.E. 713 (1936); *Nightingale v. Juniata College*, 186 Ga. 365, 197 S.E. 831 (1938); *E. Fredericks, Inc. v. Felton Beauty Supply Co.*, 58 Ga. App. 320, 198 S.E. 324 (1938); *Peoples Bank v. Jones*, 193 Ga. 720, 20 S.E.2d 74 (1942); *Sterchi Bros. Stores v. Clark*, 68 Ga. App. 259, 22 S.E.2d 740 (1942); *Rose v. Crane Heating Co.*, 198 Ga. 295, 31 S.E.2d 717 (1944); *Townsend v. Tattnall Bank*, 76 Ga. App. 500, 46 S.E.2d 607 (1948); *Berger v. Noble*, 81 Ga. App. 34, 57 S.E.2d 844 (1950); *Moore v. Bank of Dahlonga*, 82 Ga. App. 142, 60 S.E.2d 507 (1950); *Burgess v. Simmons*, 207 Ga. 291, 61 S.E.2d 410 (1950); *East Atlanta Bank v. Nicholson*, 83 Ga. App. 557, 63 S.E.2d 699 (1951); *Milner v. Ingram & Le Grand Lumber Co.*, 86 Ga. App. 543, 71 S.E.2d 786 (1952); *Richards v. Dye*, 89 Ga. App. 376, 79 S.E.2d 548 (1953); *Cesaroni v. Savannah Bank & Trust*

Co., 90 Ga. App. 107, 82 S.E.2d 172 (1954); National Nu Grape Co. v. Citizens & S. Nat'l Bank, 94 Ga. App. 5, 93 S.E.2d 381 (1956); Pioneer Neon Supply Co. v. Johnson & Johnson Constr. Co., 95 Ga. App. 565, 98 S.E.2d 156 (1957); Dealers' Disct. Corp. v. Trammell, 98 Ga. App. 748, 106 S.E.2d 850 (1958); Weiss v. Johnson & Johnson Constr. Co., 98 Ga. App. 858, 107 S.E.2d 708 (1959); Birkett L. Williams Co. v. Smith, 353 F.2d 60 (5th Cir. 1965); Levy v. Empire Ins. Co., 379 F.2d 860 (5th Cir. 1967); Weiss v. Moody, 121 Ga. App. 682, 175 S.E.2d 82 (1970); International Harvester Credit Corp. v. Commercial Credit Equip. Corp., 125 Ga. App. 477, 188 S.E.2d 110 (1972); Mayor of Athens v. Gregory, 231 Ga. 710, 203 S.E.2d 507 (1974); Jackson's Atlanta Ready Mix Concrete Co. v. Industrial Tractor Parts Co., 139 Ga. App. 422, 228 S.E.2d 324 (1976); Georgia Ins. Agencies, Inc. v. Sentry Indem. Co., 152 Ga. App. 728, 263 S.E.2d 702 (1979).

Fraud Generally

One of the essential elements of a cause of action for the common-law tort of deceit based upon fraud is the plaintiff's right to rely upon the representations. *Braselton Bros. v. Better Maid Dairy Prods., Inc.*, 113 Ga. App. 382, 148 S.E.2d 71, rev'd on other grounds, 222 Ga. 472, 150 S.E.2d 620 (1966).

The master could be held liable for the servant's fraudulent presentation of invoices and receiving payment for more goods than were actually delivered by reason of having clothed him with apparent authority and upon the equitable principle contained in this section that as between two innocent persons that he who put it in the power of the male-factor to inflict the loss should bear it. *Lecroy v. Acme Meat Co.*, 125 Ga. App. 566, 188 S.E.2d 255 (1972).

Under ordinary conditions, in cases where a fraud has been committed by an agent, this rule (contained in this section) has been invoked against his principal for the reason that the employer, by clothing the agent with apparent authority to act for him, has made the accomplishment of the fraud possible. But the doctrine applies with equal force against the defrauded

third person where it appears he could have easily detected the deceit and neglected to do so for, under such circumstances, his fault must be regarded as the proximate and efficient cause of the loss. *Braselton Bros. v. Better Maid Dairy Prods., Inc.*, 113 Ga. App. 382, 148 S.E.2d 71, rev'd on other grounds, 222 Ga. 472, 150 S.E.2d 620 (1966).

A principal who puts a servant or other agent in a position which enables the agent while apparently acting within his authority, to commit a fraud upon third persons is subject to liability to such third persons for the fraud. *Braselton Bros. v. Better Maid Dairy Prods., Inc.*, 113 Ga. App. 382, 148 S.E.2d 71, rev'd on other grounds, 222 Ga. 472, 150 S.E.2d 620 (1966).

Misrepresentations are not actionable unless the plaintiff was justified in relying upon them in the exercise of common prudence and diligence. They must have been made under such circumstances that the injured party had a right to rely on them. *Braselton Bros. v. Better Maid Dairy Prods., Inc.*, 113 Ga. App. 382, 148 S.E.2d 71, rev'd on other grounds, 222 Ga. 472, 150 S.E.2d 620 (1966).

A person who otherwise would be liable to another for the misrepresentations of one apparently acting for him is not relieved from liability by the fact that the servant or agent acts entirely for his own purposes, unless the other has notice of this. *Braselton Bros. v. Better Maid Dairy Prods., Inc.*, 113 Ga. App. 382, 148 S.E.2d 71, rev'd on other grounds, 222 Ga. 472, 150 S.E.2d 620 (1966).

Equitable Estoppel

Equitable estoppel. — Where the owner of an automobile offers it for sale at an auction, and it is unconditionally delivered to such purchaser, the seller accepting a check for the purchase price, and such purchaser sells it for a valuable consideration to a third person who has no notice of the giving of the check, the title of the original owner is divested or he is estopped from asserting it as against the innocent third-party purchaser although the check is unpaid and returned as worthless. *Blount v. Bainbridge*, 79 Ga. App. 99, 53 S.E.2d 122 (1949).

Where the owner of an automobile voluntarily relinquished possession of it to a third person who gave him a worthless check, the owner is precluded from disputing, as against a bona fide purchaser, the existence of any title or power of sale, which through his own lack of caution, negligence or mistaken confidence, he caused or allowed to appear to be vested in the third person with whom the innocent purchaser dealt. *Equitable Credit & Dist. Co. v. Murray*, 70 Ga. App. 795, 54 S.E.2d 650 (1949).

Wife's transfer and delivery of stock certificate to her husband operates to invest the husband with such external indicia of ownership that his pledge to an innocent lender is, on the principle of estoppel, binding upon her. The private understanding between a wife and her husband that she was merely lending the stock to him does not affect the right of the bank to hold the stock as security for a loan, where it acted innocently and without knowledge of such agreement. *Groover v. Savannah Bank & Trust Co.*, 186 Ga. 476, 198 S.E. 217 (1938).

Where defendant loan company made

check payable to name given by the person who made application for a loan, delivered the check to him, and did not question his identity, the loan company and not the plaintiff who subsequently cashed the check for payee, knowing him by the name thereon, was responsible for the mistaken identity, if any, of the person to whom it issued and delivered the check. *Peoples Loan & Sav. Co. v. Pardue*, 56 Ga. App. 632, 193 S.E. 486 (1937).

Rule that where an owner has given to another such evidence of the right of selling his goods as, according to the custom of trade or the common understanding of the world, usually accompanies the authority of disposal, or has given the external indicia of the right of disposing of his property, a sale to an innocent purchaser divests the true owner's title, is merely a special application of the rule embodied in this section that, "When one of two innocent persons must suffer by the act of a third person, he who put it in the power of the third person to inflict the injury shall bear the loss." *Cook Motor Co. v. Richardson*, 103 Ga. App. 129, 118 S.E.2d 502 (1961).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Equity, §§ 146, 147.

ALR. — Propriety of suit in equity by or against several insurers under fire policies covering same risk, 98 ALR 181.

Who must bear loss as between drawer induced by fraud of employee or agent to issue check payable to nonexistent person or a person having no interest in the proceeds thereof, and one who cashes or pays

it on the forged endorsement by such employee or agent of the name of such ostensible payee, 99 ALR 439.

Relative rights as between purchaser of chattel from one who had previously bought it with stolen money, and victim of the theft, 62 ALR2d 537.

Right to reformation of contract or instrument as affected by intervening rights of third persons, 79 ALR2d 1180.

23-1-15. Where both parties equally at fault; where fault is unequal.

When both parties are equally at fault, equity will not interfere but will leave them where it finds them. The rule is otherwise if the fault of one decidedly overbalances that of the other. (Orig. Code 1863, § 3026; Code 1868, § 3038; Code 1873, § 3093; Code 1882, § 3093; Civil Code 1895, § 3937; Civil Code 1910, § 4534; Code 1933, § 37-112.)

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
EQUAL FAULT
UNEQUAL FAULT

General Consideration

As a general rule, equity will not grant relief to a party who comes into court with unclean hands, or is guilty of an illegal or immoral act, nor aid a grantor or his administrator in seeking to cancel a security deed which was executed by him for the purpose of hindering, delaying or defrauding creditors; these rules stem from the just and salutary principle that one will not be permitted to profit by his own wrong, and apply where a party is seeking the aid of equity in the enforcement of executory contracts or its aid under an executed contract. *Fuller v. Fuller*, 211 Ga. 201, 84 S.E.2d 665 (1954).

Cited in *Felder v. Paulk*, 165 Ga. 135, 139 S.E. 873 (1927); *Nowell v. Mayor of Monroe*, 177 Ga. 648, 171 S.E. 136 (1933); *Harrell v. Fiveash*, 182 Ga. 324, 185 S.E. 327 (1936); *Turner v. Davidson*, 183 Ga. 404, 188 S.E. 828 (1936); *Roberts v. Roberts*, 55 Ga. App. 456, 190 S.E. 442 (1937); *Gibbs v. H.T. Henning Co.*, 189 Ga. 675, 7 S.E.2d 238 (1940); *Townsend v. Tattnall Bank*, 76 Ga. App. 500, 46 S.E.2d 607 (1948); *Clifton v. Dunn*, 208 Ga. 326, 66 S.E.2d 735 (1951); *Pearl Optical, Inc. v. Pearle Optical of Ga., Inc.*, 218 Ga. 701, 130 S.E.2d 223 (1963); *Oliver v. Forshee*, 224 Ga. 200, 160 S.E.2d 828 (1968); *Adams v. Smith*, 129 Ga. App. 850, 201 S.E.2d 639 (1973); *Daubresse v. Smithey*, 231 Ga. 725, 204 S.E.2d 133 (1974); *Griggs v. Griggs*, 242 Ga. 96, 249 S.E.2d 566 (1978); *Head v. Walker*, 243 Ga. 108, 252 S.E.2d 440 (1979).

Equal Fault

In fraudulent transactions equity leaves both parties just as it finds them. *Harrell v. Fiveash*, 182 Ga. 324, 185 S.E. 327 (1936).

Neither a court of law nor a court of equity will lend its aid to a party where it

affirmatively appears that the plaintiff and defendant are in pari delicto. *Nash v. Jones*, 224 Ga. 372, 162 S.E.2d 392 (1968).

Where transaction upon which suit was instituted was fraudulent in its inception, and petitioner's testator and the defendant were in *pari delicto*, equity will not interfere, but will leave the parties where it finds them. *Roberts v. Roberts*, 182 Ga. 568, 186 S.E. 192 (1936).

Where one is engaged with another in the simultaneous and willful violation of the same penal statute, he cannot recover damages for injuries inflicted upon him through the negligence of his joint wrongdoer unless the violation of the statute was not a contributing cause of the injuries; this is based upon the principle that the parties are in *pari delicto*, that what each does is the act of the other and that to permit a recovery under such circumstances would be in violation of public policy. *Gaines v. Wolcott*, 119 Ga. App. 313, 167 S.E.2d 366 (1969).

An executed contract, such as an absolute conveyance purporting on its face to be a deed for the sale of land, though in fact a "mere sham" and made for the purpose of delaying or defrauding a creditor, is binding upon the maker, and he is estopped from impeaching it. *Langan v. Langan*, 224 Ga. 399, 162 S.E.2d 405 (1968).

A husband who, in order to delay or defeat the collection of a claim for alimony or other lawful demands against him, conveyed land to another person and put that person in possession, could not maintain against the latter an action for the breach of a bond given by him to reconvey the land whenever so required. This is so, not because the law is disposed to aid one of the wrongdoers in retaining the fruits of the unlawful transaction, but because it denies the benefit of its remedies to the other. *Langan v. Langan*, 224 Ga. 399, 162 S.E.2d 405 (1968).

Unequal Fault

The rule that equity refuses to interfere where both parties are at fault does not apply when the faults are unequal. *Atlanta Ass'n of Fire Ins. Agents v. McDonald*, 181 Ga. 105, 181 S.E. 822 (1935).

If the fault of one decidedly overbalances the other, equity may interfere. *Atlanta Ass'n of Fire Ins. Agents v. McDonald*, 181 Ga. 105, 181 S.E. 822 (1935).

RESEARCH REFERENCES

C.J.S. — 30 C.J.S., Equity, § 89.

ALR. — Illicit sexual relations between man and woman as affecting right of either to recover money paid or property transferred to other, 120 ALR 475.

Right of partner or joint adventurer to accounting where firm business or transactions are illegal, 32 ALR2d 1345.

Right to reformation of contract or

instrument as affected by intervening rights of third persons, 79 ALR2d 1180.

Negligence in executing contract as affecting right to have it reformed, 81 ALR2d 7.

Right of action for injury to or death of woman who consented to illegal abortion, 36 ALR3d 630.

23-1-16. Taking with notice of equity.

He who takes with notice of an equity takes subject to that equity. (Orig. Code 1863, § 3024; Code 1868, § 3036; Code 1873, § 3091; Code 1882, § 3091; Civil Code 1895, § 3932; Civil Code 1910, § 4529; Code 1933, § 37-115.)

JUDICIAL DECISIONS

Ordinarily proof of notice will avail nothing unless a party can couple such proof of notice with proof of a right, title, equity, claim or interest in the land in controversy. *Hicks v. Smith*, 205 Ga. 614, 54 S.E.2d 407 (1949).

Where a successor tenant in common acquired her interest by deed of gift, she took, not as a bona fide purchaser, but with notice of whatever equities the other original tenant in common had in the property. *Bowers v. Bowers*, 208 Ga. 85, 65 S.E.2d 153 (1951).

If after notice that one has made a contract to pass title to another to certain property, a third person cuts in, buys it, and takes a conveyance thereto, such person stands in the place of his vendor, and a court of equity, if it would decree specific

performance of the contract by his vendor, will render a like decree against him. *Pace v. Pace*, 220 Ga. 66, 137 S.E.2d 28 (1964).

Cited in *Waynesboro Planing Mill v. Augusta Veneer Co.*, 35 Ga. App. 686, 134 S.E. 790 (1926); *Voyles v. Carr*, 173 Ga. 627, 160 S.E. 801 (1931); *Carmichael Title Co. v. Yaarab Temple Bldg. Co.*, 177 Ga. 318, 170 S.E. 294 (1933); *Toms v. Knighton*, 199 Ga. 858, 36 S.E.2d 315 (1945); *Shirling v. Hester*, 201 Ga. 706, 40 S.E.2d 743 (1946); *Smith v. Lanier*, 202 Ga. 165, 42 S.E.2d 495 (1947); *Stembridge v. Smith*, 213 Ga. 227, 98 S.E.2d 609 (1957); *Dollar v. Dollar*, 214 Ga. 499, 105 S.E.2d 736 (1958); *Williamson v. Floyd County Wildlife Ass'n*, 215 Ga. 789, 113 S.E.2d 626 (1960).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Equity, §§ 139, 167.

ALR. — Right of one who, with knowledge of outstanding equity, derived his

interest in real property from or through a bona fide purchaser, to same protection as latter, 63 ALR 1362.

23-1-17. Scope of notice; ignorance due to negligence.

Notice sufficient to excite attention and put a party on inquiry shall be notice of everything to which it is afterwards found that such inquiry might have led. Ignorance of a fact due to negligence shall be equivalent to knowledge in fixing the rights of parties. (Civil Code 1895, § 3933; Civil Code 1910, § 4530; Code 1933, § 37-116.)

History of section. — This section is derived from the decisions in *Hunt v.*

Dunn, 74 Ga. 120 (1884) and *Schmidt v. Block*, 76 Ga. 823 (1886).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

SCOPE OF NOTICE

NEGLIGENCE

General Consideration

Application of section to waiver clause in contracts of insurance. — The provisions of this section have no application to the subject of waiver, as related to conditions imposing forfeitures in contracts of insurance. *Prudential Ins. Co. of America v. Perry*, 121 Ga. App. 618, 124 S.E.2d 570 (1970); *Shield Ins. Co. v. Kitt*, 143 Ga. App. 48, 237 S.E.2d 515 (1977), rev'd on other grounds, 240 Ga. 619, 241 S.E.2d 824 (1978).

Actual notice. — Actual notice is shown, when the proof, positive or presumptive, authorizes the clear and satisfactory conclusion, that the purchaser had knowledge of the incumbrance, or would have had it, if he had not willfully declined to search for it, and thus his conscience is affected by it; and constructive notice, is that which arises out of a legal inference, or presumption strictly speaking, such as notice from a register, record, or some such matter; and which does not affect the

conscience of the purchaser, because, notwithstanding the legal presumption, he may never have had absolute knowledge of the record or been put upon inquiry in relation to it. *Citizens & S. Bank v. Morris State Bldg. Corp.*, 243 Ga. 169, 253 S.E.2d 89 (1979).

Existence of notice determined by jury.

— The question as to whether the defendant had actual notice, or as to whether the circumstances were sufficient to put him on notice, of the state of the title to certain property, were questions to be determined by the jury. *Dollar v. Dollar*, 214 Ga. 499, 105 S.E.2d 736 (1958).

General reputation is not notice of fact.

— While general reputation or notoriety of a proven fact may be admissible in evidence, to be considered by the jury, with other evidence, on the question of notice of such fact, such reputation or notoriety in the community is not itself notice of the fact. *Roebuck v. Payne*, 109 Ga. App. 525, 136 S.E.2d 399 (1964).

Cited in North Ga. Trust & Banking Co. v. Hulme, 35 Ga. App. 627, 134 S.E. 200 (1926); Planing Mill v. Augusta Veneer Co., 35 Ga. App. 686, 134 S.E. 790 (1926); Darden v. Washington, 35 Ga. App. 777, 134 S.E. 813 (1926); Fender v. Hodges, 38 Ga. App. 78, 142 S.E. 753 (1928); Todd v. Lewis, 169 Ga. 1, 149 S.E. 562 (1929); Investor's Syndicate v. Thompson, 172 Ga. 203, 158 S.E. 20 (1931); Mathis v. Mathis, 42 Ga. App. 1, 155 S.E. 88 (1930); United Eng'rs & Constructors, Inc. v. Fiat Metal Mfg. Co., 175 Ga. 509, 165 S.E. 609 (1932); Georgia R.R. Bank & Trust Co. v. Liberty Nat'l Bank & Trust Co., 180 Ga. 4, 177 S.E. 803 (1934); Shaw v. National Life Ins. Co., 51 Ga. App. 794, 181 S.E. 872 (1935); Fite v. Walker, 183 Ga. 46, 187 S.E. 95 (1936); H.C. Witmer Co. v. Petty, 54 Ga. App. 377, 187 S.E. 908 (1936); Rowe v. Cole, 183 Ga. 477, 188 S.E. 668 (1936); Heath v. Davis, 184 Ga. 704, 192 S.E. 727 (1937); Mutual Benefit Health & Accident Ass'n v. Hulme, 57 Ga. App. 876, 197 S.E. 85 (1938); Groover v. Savannah Bank & Trust Co., 186 Ga. 476, 198 S.E. 217 (1938); Georgia State Sav. Ass'n v. Wilson, 189 Ga. 21, 5 S.E.2d 14 (1939); Lewis v. Patterson, 191 Ga. 348, 12 S.E.2d 593 (1940); Federal Land Bank v. Drake, 64 Ga. App. 684, 14 S.E.2d 178 (1941); Pound v. Faulkner, 193 Ga. 413, 18 S.E.2d 749 (1942); Joel v. Publix-Lucas Theater, Inc., 193 Ga. 531, 19 S.E.2d 730 (1942); Hall v. Turner, 198 Ga. 763, 32 S.E.2d 829 (1945); Cooper v. Aycock, 199 Ga. 658, 34 S.E.2d 895 (1945); Wren v. Wren, 199 Ga. 851, 36 S.E.2d 77 (1945); Toms v. Knighton, 199 Ga. 858, 36 S.E.2d 315 (1945); Kilby v. Sawtell, 203 Ga. 256, 46 S.E.2d 117 (1948); Adler v. Adler Co., 205 Ga. 818, 55 S.E.2d 13 (1949); Ogletree v. West Lumber Co., 208 Ga. 43, 64 S.E.2d 894 (1951); United States v. West, 132 F. Supp. 934 (N.D. Ga. 1955); Exchange Ins. Ass'n v. Mathews, 93 Ga. App. 470, 92 S.E.2d 121 (1956); Ballentine Motors of Ga., Inc. v. Nimmons, 93 Ga. App. 708, 92 S.E.2d 714 (1956); Peoples Loan & Fin. Corp. v. Halbeisem Motors Co., 271 F.2d 538 (5th Cir. 1959); Dixie Belle Mills, Inc. v. Specialty Mach. Co., 217 Ga. 104, 120 S.E.2d 771 (1961); Frye v. Commonwealth Inv. Co., 107 Ga. App. 739, 131 S.E.2d 569 (1963); Cohen v. Gotlieb, 108 Ga. App. 122, 132 S.E.2d 93

(1963); Kamlapat v. Purvis-Wade Carpet Mills, 112 Ga. App. 781, 146 S.E.2d 138 (1965); D.H. Overmyer Co. v. Joe Summers Roofing Co., 120 Ga. App. 188, 169 S.E.2d 821 (1969); Buffalo Ins. Co. v. Star Photo Finishing Co., 120 Ga. App. 697, 172 S.E.2d 159 (1969); Robinson v. Transcontinental Gas Pipe Line Corp., 306 F. Supp. 201 (N.D. Ga. 1969); Hodges v. Youmans, 122 Ga. App. 487, 177 S.E.2d 577 (1970); Goldman v. Hart, 134 Ga. App. 422, 214 S.E.2d 670 (1975); Brannon v. First Nat'l Bank, 137 Ga. App. 275, 223 S.E.2d 473 (1976); Crymes v. Ryland Group, Inc., 143 Ga. App. 436, 238 S.E.2d 764 (1977); Bohannon v. Manhattan Life Ins. Co., 555 F.2d 1205 (5th Cir. 1977); Gulden v. Newberry Wrecker Serv., Inc., 154 Ga. App. 130, 267 S.E.2d 763 (1980).

Scope of Notice

Effect of notice sufficient to excite attention. — Whatever is notice enough to excite attention and put the party on his guard and call for inquiry, is also notice of everything to which it is afterwards found that such inquiry might have led, although all was unknown for want of investigation; that is, where a person has sufficient information to lead him to a fact, he shall be deemed cognizant of it. *Southern Ry. v. Watson*, 74 Ga. App. 317, 39 S.E.2d 707 (1946).

Failure to take any action with respect to notice sufficient to excite inquiry justifies a presumption against the existence or validity of the right which one later seeks to assert, or justifies the presumption that if one ever possessed such a right it has been abandoned or waived or has been satisfied. *Cohen v. Glass*, 225 Ga. 646, 171 S.E.2d 118 (1969).

Where the plaintiff contended that the defendant had actual notice of his claim of equitable title to the property because of testimony of the plaintiff delivered in the defendant's presence in the court of ordinary (now probate court), the rule announced by this section that one having only such notice as would excite attention and put one on inquiry would be chargeable with notice of everything to which such inquiry might have led, was not directly involved, and if a charge of this principle was desired, a written request

therefor should have been made. *Dollar v. Dollar*, 214 Ga. 499, 105 S.E.2d 736 (1958).

A purchaser, having knowledge such as would lead a reasonable man to make inquiries which would disclose facts sufficient to bar the rights of his grantor, is himself barred. *Hendrix v. W.R. Altman Lumber Co.*, 145 F.2d 501 (5th Cir. 1944).

Where defendant loan association had notice of the plaintiff's equity in the land at and before the time the association took its security deed from another person, such security deed was subject to cancellation as between the plaintiff and the association, whether or not it might still be treated as valid against the grantor to the extent of the latter's interest. *Fulmore v. Macon Fed. Savs. & Loan Ass'n*, 191 Ga. 51, 11 S.E.2d 790 (1940).

Where a clerk sought to renew his bond in a manner not recognized by law, this irregularity alone was sufficient to put the mayor and council on inquiry and to affect them with constructive knowledge of every condition and circumstance which a proper inquiry would have disclosed, including the fact that the only contract actually proposed by the company was one which should embrace the terms of the continuation certificate. *Nowell v. Mayor of Monroe*, 177 Ga. 648, 171 S.E. 136, answer conformed to, 47 Ga. App. 665, 171 S.E. 143 (1933).

A municipality is charged, as a matter of law, with notice that a clerk and treasurer as agent of a fidelity company cannot consummate a valid contract in the nature of an official bond without a writing signed by the company. *Nowell v. Mayor of Monroe*, 177 Ga. 648, 171 S.E. 136 (1933).

Whether a judge's statement is intended merely as a finding on an issue of fact or as a ruling that under the evidence the party was charged with knowledge as a matter of law; the evidence may be sufficient to authorize a finding of notice. *Alropa Corp. v. Snyder*, 182 Ga. 305, 185 S.E. 352 (1936).

When parties are furnished with a list of the jury, it is their duty, if they know that any of the jurors are disqualified, to call attention to the same, or the disqualification will be held to have been waived; if they have reasonable grounds to suspect that any of the jurors are

disqualified, it is their duty to call attention to the fact, so that due inquiry may be made of the panel. *Kennedy v. State*, 191 Ga. 22, 11 S.E.2d 179 (1940).

The court did not err in overruling ground of motion for new trial based on alleged disqualification of juror whose mind, it was claimed, was not perfectly impartial between the state and the accused, where on consideration of the evidence introduced by the defendant and the state in reference to this ground, the judge was authorized to find that the juror was not disqualified as contended. *Kennedy v. State*, 191 Ga. 22, 11 S.E.2d 179 (1940).

Where the vendor of an interest in real property is in prison the vendee is put on notice of the lien for costs, or notice of a fact which, if diligently investigated, would have disclosed the lien. *Pound v. Faulkner*, 193 Ga. 413, 18 S.E.2d 749 (1942).

A recorded deed, in order to operate as a constructive notice to a bona fide purchaser of land, must be a link in the purchaser's chain of title. *Real Estate Operators, Inc. v. McMahon*, 171 Ga. 454, 155 S.E. 755 (1930).

The proper recording of a security deed is notice to the entire world of its lien from that date and such notice continues until it is properly canceled of record. *Rossville Fed. Sav. & Loan Ass'n v. Chase Manhattan Bank*, 223 Ga. 188, 154 S.E.2d 243 (1967).

One claiming title to lands is chargeable with notice of every matter which appears in his deed, and of any matters which appear on the face of any deed, decree, or other instrument forming an essential link in the chain of instruments through which he derails title, and of whatever matters he would have learned by any inquiry which the recitals of those instruments made it his duty to pursue. *Henson v. Bridges*, 218 Ga. 6, 126 S.E.2d 226 (1962).

Where the security deed was accepted after being expressly told by petitioner of his equitable interest in the land (as to which there was evidence though conflicting), the fact that the records were fully examined and did not disclose any such equitable interest, but did disclose the legal title of the grantor in the security deed, would not excuse failure of the grantee in the security deed to make inquiry of the petitioner as to the facts upon which he

based his claim of interest. *Bell v. Bell*, 178 Ga. 225, 172 S.E. 566 (1934).

The continued possession of a grantor who executes an absolute deed demands that one who purchases from the grantee inquire into the right of his occupancy. *Chandler v. Georgia Chem. Works*, 182 Ga. 419, 185 S.E. 787 (1936).

Where an inquiry made by the prospective purchaser of defendant, or an examination by him of the public records of the county, would have resulted in the discovery of unpaid retention of title contract, is sufficient notice. *Shippen v. Georgia Power Co.*, 172 Ga. 913, 159 S.E. 268 (1931).

The possession of the tenant being the possession of the landlord, and the landlord having apparently executed an absolute deed conveying to another, and that deed being recorded, purchaser would be authorized to assume that, as a matter of law, the possession of the tenant was held under the grantee, and not adversely to the latter's title. *Chestnut v. Weekes*, 180 Ga. 701, 180 S.E. 716 (1935).

A purchaser who was informed by reservation in his deed of the existence of a contract for the removal of timber from said land, was chargeable with notice of the terms of such contract. *Hendrix v. W.R. Altman Lumber Co.*, 145 F.2d 501 (5th Cir. 1944).

The knowledge chargeable to a party after he is put on inquiry is not limited to such knowledge only as would be gained by an examination of the public records. *Dyal v. McLean*, 188 Ga. 229, 3 S.E.2d 571 (1939); *Collins v. Freeman*, 226 Ga. 610, 176 S.E.2d 704 (1970).

Negligence

Equity requires diligence, and will not do for one that which he could have done for himself but for his own negligence. *Glens Falls Indem. Co. v. Liberty Mut. Ins. Co.*, 202 Ga. App. 752, 44 S.E.2d 543 (1947).

An equitable action to cancel a deed on the ground of fraud, which clearly shows that the complainant failed to use even slight diligence to discover the fraud, fails to allege a cause of action. Equity will not grant relief to one whose long delay renders the ascertainment of the truth

difficult, though no legal limitation bars the action. *Whitfield v. Whitfield*, 204 Ga. 64, 48 S.E.2d 852 (1948).

Where a creditor did not exercise diligence before he accepted a warranty deed in satisfaction of his debt, under this section, he was chargeable with the knowledge that timber had been cut from the land. *Westbrook v. Beusse*, 79 Ga. App. 654, 54 S.E.2d 693 (1949).

If by negligence one voluntarily remains ignorant of a fact materially affecting his interest and subsequently loses a right or property, he should not expect equity to do that for him which he refuses to do for himself. *Cohen v. Glass*, 225 Ga. 646, 171 S.E.2d 118 (1969).

Negligent ignorance is equivalent to knowledge. *Southern Ry. Co. v. Watson*, 74 Ga. App. 317, 39 S.E.2d 707 (1946).

And equity will not relieve a person from his erroneous acts or omissions resulting from his own negligence. *Mangham v. Hotel & Restaurant Supply Co.*, 107 Ga. App. 619, 131 S.E.2d 74 (1963).

In the sale of real estate and where there are no confidential relations alleged, the law will not protect a party in his own negligence. *Westbrook v. Beusse*, 79 Ga. App. 654, 54 S.E.2d 693 (1949).

Where two contracting parties deal at arms length with one another, and a written instrument is entered into and signed, and there is no evidence of artifice or fraud, and each party had ample opportunity to inform himself as to the amounts claimed due, and a party negligently omitted to take such precautions as would reasonably serve to protect himself, the defense of mistake of fact, if there is one — is obviously caused by the party's own neglect and is not available as a defense. *Berry v. Atlas Metals, Inc.*, 152 Ga. App. 437, 263 S.E.2d 179 (1979).

Where a purchaser has knowledge of any fact sufficient to put a prudent man upon an inquiry which, if prosecuted with ordinary diligence, would lead to actual notice of some right or title in conflict with that he is about to purchase, it is his duty to make the inquiry; and, if he does not make it, he is guilty of bad faith or negligence to such extent that the law will presume that he made it, and will charge him with the actual

notice he would have received if he had made it. *Commodity Credit Corp. v. Wells*, 188 Ga. 287, 3 S.E.2d 642 (1939).

The fact that the attorneys for the purchaser, and therefore the purchaser, have actual knowledge of the pendency of a suit for a money judgment in a tort action will not charge them with notice of the rendition of a judgment in that case, where no execution had been issued and recorded as provided by the statute, and they will not be chargeable with negligence, and therefore with notice, because they did not examine the papers in the suit, examine the bar docket, examine the minutes of the court, or make inquiry of plaintiff's counsel in that case, for: "What the law requires . . . to put innocent third parties upon notice of the existence of a judgment lien is an entry of the execution upon a certain record in the office of the clerk of the superior court. Where there is a failure to make such record, third parties are not charged with any duty to make an investigation or inquiry in relation to the existence of such a lien against their vendor." *Jackson v. Faver*, 210 Ga. 58, 77 S.E.2d 728 (1953).

Once a cab company had knowledge that the diagnosis of a physician showed a cab operator-employee was subject to recurring loss of consciousness which rendered it dangerous for him to drive, mere failure of the cab company to ascertain whether or not he had made a recovery would fall under the head of "negligent ignorance" which would be insufficient to relieve it from liability for the unfortunate consequences following upon a seizure while the defendant was operating the taxicab. *Jackson v. Co-op Cab Co.*, 102 Ga. App. 688, 117 S.E.2d 627 (1960).

Notice which would charge a purchaser of personal property with negligence in not

discovering a defect in the vendor's title, which the vendor impliedly warranted in the sale, is not the constructive notice derived from the record in the clerk's office as required by law of instruments affecting the title to property, before a purchaser can be charged with negligence in failing to discover a defect in the vendor's title to the property sold, the purchaser must have had actual notice of the defect, or notice of a fact sufficient to put the purchaser upon inquiry as to the state of the title to the property. *Perrin v. Reardon*, 44 Ga. App. 823, 163 S.E. 300 (1932).

The failure of a petitioner to know the content defining the coverage of its insurance contract or to compare the facts and circumstances surrounding the injury to ascertain if it was covered thereby, and its failure to inquire of the employer or the industrial board (Board of Worker's Compensation) as to the existence of an insurance contract with another insurance carrier that covered the injury, amounted to negligence on the part of the petitioner, and would not constitute such a mistake of fact as would render the agreement and the payments thereunder involuntary and, therefore, a basis for subrogation. *Glens Falls Indem. Co. v. Liberty Mut. Ins. Co.*, 202 Ga. 752, 44 S.E.2d 543 (1947).

Subrogation for voluntary payments is not allowed. Subrogation will be allowed, (1) where there are existing circumstances which in equity amount to an implied agreement for subrogation; or (2) where there is an agreement with either the debtor or the creditor whereby one making the payment will be subrogated to the rights and remedies of the original creditor. *Glens Falls Indem. Co. v. Liberty Mut. Ins. Co.*, 202 Ga. App. 752, 44 S.E.2d 543 (1947).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Equity, §§ 145, 167.

C.J.S. — 37 C.J.S., Fraud, § 28 et seq.

ALR. — Possession of land by cotenant after acquisition of interest of another cotenant as notice to subsequent purchaser from or creditor of latter, 162 ALR 209.

What constitutes notice to subsequent purchaser of real property of option to purchase contained in unrecorded lease, 17 ALR2d 331.

Right to reformation of contract or instrument as affected by intervening rights of third persons, 79 ALR2d 1180.

Right of vendee under executory land contract to lien for amount paid on purchase price as against subsequent creditors of or purchasers from vendor, 82 ALR3d 1040.

23-1-18. Pending action as notice; effect on purchaser.

Decrees ordinarily bind only parties and their privies; but a pending action shall be a general notice of an equity or claim to all the world from the time the action is filed and docketed. If the same is duly prosecuted and is not collusive, one who purchases pending the final outcome of the litigation shall be affected by the decree rendered therein. (Civil Code 1895, § 3936; Civil Code 1910, § 4533; Code 1933, § 37-117.)

History of section. — This section is derived from the decisions in Carmichael v. Wright, 72 Ga. 848 (1884), and Weems v. Harrold, Johnson & Co., 75 Ga. 866 (1885). Foster, 69 Ga. 372 (1882), Wilson v.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION DOCTRINE OF LIS PENDENS

1. IN GENERAL
2. APPLICATION OF DOCTRINE

General Consideration

Cited in Bennett v. Stokey, 164 Ga. 694, 139 S.E. 346 (1927); Plainvill Brick Co. v. Williams, 170 Ga. 75, 152 S.E.2d 85 (1930); Jackson v. Massachusetts Mut. Life Ins. Co., 183 Ga. 659, 189 S.E. 243 (1936); A.B. Farquhar Co. v. Myers, 194 Ga. 220, 21 S.E.2d 432 (1942); Foster v. Rowland, 194 Ga. 845, 22 S.E.2d 777 (1942); Fleminster v. Billups, 202 Ga. 132, 42 S.E.2d 376 (1947); Wilson v. Blake Perry Realty Co., 219 Ga. 57, 131 S.E.2d 555 (1963).

Doctrine of Lis Pendens

1. In General

Purpose of doctrine of lis pendens. — Lis pendens, whether it be from the common law as provided in this section or by statute (T. 44, Ch. 14, Art. 9), has for its purpose the protection of innocent purchasers of real property involved in pending litigation. Patent Scaffolding Co. v. Byers, 220 Ga. 426, 139 S.E.2d 332 (1964).

Lis pendens is the jurisdiction, power, or control which courts acquire over property involved in a suit, pending the continuance of the action, and until the final judgment therein. Coleman v. Law, 170 Ga. 906, 154 S.E. 445 (1930).

The underlying, if not the sole, object of the maxim "pendente lite nihil innovetur," is to keep the subject of the suit or res within the power of the court until the judgment or decree shall be entered, and thus to make it possible for courts of justice to give effect to their judgments and decrees. Carmichael Tile Co. v. Yaarab Temple Bldg. Co., 177 Ga. 318, 170 S.E. 294 (1933).

While special circumstances may alter the rule, it is the general rule that where the rights of the plaintiff to the property in question are secured under the rule of lis pendens, the judge in the exercise of his discretion may refuse an interlocutory injunction. Ingram & Le Grand Lumber Co. v. McAllister, 188 Ga. 626, 4 S.E.2d 558 (1939).

An application in the court of ordinary (now probate court) to probate a will, which, although denied for lack of evidence to prove it, was still pending therein, was not a suit within the meaning of the law of *lis pendens*, and did not operate so as to affect the title of one who purchased at the sale of the administrator, the appointment and sale taking place subsequently to an order of the ordinary (now probate judge) denying probate, although the will on the original application was thereafter duly probated. *Scarborough v. Long*, 186 Ga. 412, 197 S.E. 796, cert. denied, 305 U.S. 637, 59 S. Ct. 107, 83 L. Ed. 410 (1938).

To the existence of a valid and effective *lis pendens*, it is essential that three elements be present: the property must be of a character to be subject to the rule; the court must have jurisdiction both of the person and the subject matter, and the property involved must be sufficiently described in the pleadings. *Walker v. Houston*, 176 Ga. 878, 169 S.E. 107 (1933); *Carmichael Tile Co. v. Yaarab Temple Bldg. Co.*, 177 Ga. 318, 170 S.E. 294 (1933); *Ingram & Le Grand Lumber Co. v. McAllister*, 188 Ga. 626, 4 S.E.2d 558 (1939).

The general rule is that *lis pendens*, duly prosecuted, and not collusive, is notice to purchaser so as to affect and bind his interest by the decree. *Ingram & Le Grand Lumber Co. v. McAllister*, 188 Ga. 626, 4 S.E.2d 558 (1939).

***Lis pendens* in itself does not create a lien of any kind**, but merely charges the purchaser with notice of the pending action. If the judgment in the pending action does not create a lien on the property, certainly notice of the action will not. *Carmichael Tile Co. v. Yaarab Temple Bldg. Co.*, 177 Ga. 318, 170 S.E. 294 (1933).

2. Application of Doctrine

The doctrine of *lis pendens* applies to a suit brought by a creditor to prevent his debtor from conveying his property away with the fraudulent intent to hinder, delay, or defraud the creditor. *Coleman v. Law*, 170 Ga. 906, 154 S.E. 445 (1930).

Actions to reach property which has been fraudulently conveyed and suits to subject specific property to the payment of debts

come within the doctrine of *lis pendens*. *Coleman v. Law*, 170 Ga. 906, 154 S.E. 445 (1930).

The rule of *lis pendens* applies to a creditor's suit to set aside a fraudulent conveyance made to defeat the creditor, so that the purchasers or other persons, acquiring interests *pendente lite*, take title subject to the decree in the suit. *Coleman v. Law*, 170 Ga. 906, 154 S.E. 445 (1930); *Walker v. Houston*, 176 Ga. 878, 169 S.E. 107 (1933).

The doctrine of *lis pendens*, properly understood and applied, will prevent a stranger from dealing with any of the parties to a pending proceeding in which a title to, or an interest in, or a lien upon designated and described real property is sought to be enforced after the proceeding is filed, and before the final decree, so as to acquire any interest in the premises involved capable of withstanding the force of the decree, or frustrating its full legal effect. *Atlanta Nat'l Bank v. Brown*, 173 Ga. 213, 159 S.E. 874 (1931).

If a lessee for sawmill purposes of growing trees sells the same on a valuable consideration, and afterwards colludes with a third person, who at the time of the sale has a suit pending against such lessee to establish and enforce an outstanding equitable interest in the trees, and so colluding accepts a valuable consideration from the third person, and on the basis thereof allows a consent verdict and decree for the plaintiff without trial of the issues in the case, such verdict and decree will be subject to collateral attack by the vendee as void on the ground of fraud, and will not be protected on the principle of *lis pendens*. In such a situation such third person should be treated as a subsequent purchaser, and not as one whose original claim became adjudicated in his favor. *Ingram & Le Grand Lumber Co. v. Burgin Lumber Co.*, 193 Ga. 404, 18 S.E.2d 774 (1942).

A suit for specific performance of a contract for the sale of land is "notice" of the claim that the plaintiff sets up therein, from the time it is commenced and docketed; and if duly prosecuted and not collusive, one purchasing the land pending the suit is affected by the final decree rendered therein, though the suit is in a county other than the one in which the land is located. *Walker v. Houston*, 176 Ga. 878, 169 S.E. 107 (1933).

Lis pendens does not apply to choses in action. Shadburn Banking Co. v. Streetman, 180 Ga. 500, 179 S.E. 377 (1935).

RESEARCH REFERENCES

C.J.S. — 54 C.J.S., Lis Pendens, §§ 2, 38.

ALR. — Judgment in favor of less than all parties to contract as bar to action against other parties, 2 ALR 124.

Statute requiring filing of formal notice of lis pendens in certain classes of cases as affecting common-law doctrine of lis pendens in other cases, 10 ALR 306.

Judgment in action on commercial paper as affecting party to the paper who was not party to the suit, 34 ALR 152.

Sufficiency of notice or knowledge of pendency of action against covenantor or his privy in order to bind the covenantor by judgment, 34 ALR 1429.

Conclusiveness of decree assessing stockholders of insolvent corporation as against nonresident stockholders not personally served within the state in which it was rendered, 48 ALR 669; 175 ALR 1419.

Lis pendens as affecting property in county or district other than that in which

action is pending, 71 ALR 1085.

Doctrine of lis pendens as applied against one who takes deed pending action pursuant to executory contract entered into before action commenced, 93 ALR 404.

Judgment in death action as precluding subsequent personal injury action by potential beneficiary of death action, or vice versa, 94 ALR3d 676.

Judgment as conclusive as against, or in favor of one not a party of record or privy to a party, who prosecuted or defended suit on behalf and in the name of party, or assisted him or participated with him in its prosecution or defense, 139 ALR 9.

Decree on bill of review reversing prior decree as affecting purchaser or mortgagee of real property in the interval between the original decree and the filing of the bill of review, 150 ALR 676.

Necessity of filing notice of lis pendens in suit to contest a will, 159 ALR 386.

23-1-19. Sale to one without notice; sale by one without notice.

If one with notice sells to one without notice, the latter shall be protected. If one without notice sells to one with notice, the latter shall be protected, as otherwise a bona fide purchaser might be deprived of selling his property for full value. (Civil Code 1895, § 3938; Civil Code 1910, § 4535; Code 1933, § 37-114.)

History of section. — This section is derived from the decision in *Collins v. Heath*, 34 Ga. 443 (1866).

Cross references. — As to power of person possessing voidable title to transfer goods to good faith purchaser for value, see § 11-2-403. As to validity of conveyance, void as against creditors, to innocent

subsequent purchaser, see § 18-2-23. As to following of misapplied trust assets through persons receiving assets without notice to person holding assets with notice, see § 53-13-63. As to effect of purchaser's notice of trust on sale of trust assets, see § 53-13-78.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
 SALE TO ONE WITHOUT NOTICE
 SALE BY ONE WITHOUT NOTICE

General Consideration

Cited in *Malsby & Co. v. Widincamp*, 24 Ga. App. 737, 102 S.E. 178 (1920); *Luke v. Ashburn Bank*, 40 Ga. App. 802, 151 S.E. 562 (1930); *Gamble v. Brooks*, 170 Ga. 662, 153 S.E. 759 (1930); *Ryals v. Lindsay*, 176 Ga. 7, 167 S.E. 284 (1932); *Jones v. Edwards*, 177 Ga. 723, 171 S.E. 285 (1933); *Chestnut v. Weekes*, 183 Ga. 367, 188 S.E. 714 (1936); *Reynolds v. Smith*, 186 Ga. 838, 199 S.E. 137 (1938); *Lewis v. Patterson*, 191 Ga. 348, 12 S.E.2d 593 (1940); *Taylor v. Perdue*, 206 Ga. 763, 58 S.E.2d 902 (1950); *Fraser v. Dolvin*, 199 Ga. 638, 34 S.E.2d 875 (1945); *Mathis v. Blanks*, 212 Ga. 226, 91 S.E.2d 509 (1956); *Arnold v. Conner*, 100 Ga. App. 503, 111 S.E.2d 638 (1959); *Murray v. Johnson*, 222 Ga. 788, 152 S.E.2d 739 (1966); *Lechman v. Cobb Dev. Co.*, 226 Ga. 103, 172 S.E.2d 688 (1970); *Jones v. Childs*, 141 Ga. App. 552, 234 S.E.2d 87 (1977); *Citizens & S. Bank v. Morris State Bldg. Corp.*, 243 Ga. 169, 253 S.E.2d 89 (1979); *Bloodworth v. Sandersville Prod. Credit Ass'n*, 245 Ga. 40, 262 S.E.2d 804 (1980).

Sale to One Without Notice

A presumption of good faith attaches to one who is a purchaser for value, which remains until overcome by proof. *Patellis v. Tanner*, 199 Ga. 304, 34 S.E.2d 84 (1945).

A son shown to have been born subsequently to the execution of a will is not entitled to recover in ejectment against a purchaser for a valid consideration who relied on the judgment of the court of ordinary (now probate court) probating the will in solemn form, and who purchased prior to any proceeding to set aside such judgment. *Mitchell v. Arnall*, 203 Ga. 384, 47 S.E.2d 258 (1948).

Where an administrator sells his decedent's estate at public outcry and he buys back as an individual the property on the

same day that he as administrator conveyed it away, the fact that the deeds were made on the same day and recited the same consideration does not amount to a void administrator's sale, and notice of the alleged fraud is not presumed. When later purchasers of the land pay value in money for the land purchased, they are presumed to be bona fide purchasers without notice. *Thomas v. Couch*, 171 Ga. 602, 156 S.E. 206 (1930).

It was not error to refuse to charge the principle that, when one attests a deed with full knowledge of its contents, he is estopped to assert an interest in the land conveyed outstanding in himself against the grantee; the evidence that a witness to petitioner's tax deed was an agent of the owner and grantor of the defendant did not authorize it, and even if the act and knowledge of the agent were attributed to the owner, defendant, without notice thereof, would not be bound. *McDonald v. Wimpy*, 206 Ga. 270, 56 S.E.2d 524 (1949).

A purchaser of real estate is not bound by recitals in a deed executed by his grantor to realty not embraced in his purchase, and which therefore does not constitute a muniment in his chain of title. *Thompson v. Randall*, 173 Ga. 696, 161 S.E. 377 (1931).

A bona fide sale of property, not made to hinder, delay, or defraud creditors, is not rendered invalid because the vendor may have been insolvent at the time. *Wells v. Blitch*, 184 Ga. 616, 192 S.E. 209 (1937).

Prior possession of land is not notice to a purchaser. — Possession of real property which will charge a purchaser with notice is possession at the time the purchaser obtains his title. *McDonald v. Taylor*, 200, Ga. 445, 37 S.E.2d 336 (1946).

The rule in this section is subject to a notable exception; and that is, a conveyance is not protected when made back to a former owner who had notice of the equity,

and who did not originally derive title through a bona fide holder. *Thompson v. Randall*, 173 Ga. 696, 161 S.E. 377 (1931).

Sale by One Without Notice

Protection of purchaser with notice predicated on bona fides of vendor. — A purchaser of land with notice of outstanding equities, from one who was without notice thereof and was entitled to status of bona fide purchaser, will be protected in his title on account of the bona fides of his vendor, and it is wholly immaterial of what nature the equity is, whether it is a lien, or an encumbrance, or a trust, or any other claim; for a bona fide purchaser of an estate, for a valuable consideration,

purges away the equity from the estate in the hands of all persons who may derive title to it. *Thompson v. Randall*, 173 Ga. 696, 161 S.E. 377 (1931).

A deed of prior date loses its priority over a subsequent deed from the same vendor, which is based on a valuable consideration, taken without notice of the existence of the first and is the second deed being the first to go to record in the office of the clerk of the superior court of the county where the land lies, and even if the vendee in the second deed took with notice, a grantee of the latter who took without notice would be protected. *Patellis v. Tanner*, 199 Ga. 304, 34 S.E.2d 84 (1945).

RESEARCH REFERENCES

ALR. — Pledgee of corporate stock as security for an antecedent debt as a bona fide purchaser within the rule which protects such purchasers against the equities of third persons, 9 ALR 1619.

Right of one who, with knowledge of outstanding equity, derived his interest in real property from or through a bona fide purchaser, to same protection as latter, 63 ALR 1362.

Bona fides of purchaser of bill or note on an executory consideration, 100 ALR 1357.

Reputation in the community as to title to or interest in land as charging one with notice or putting him on inquiry, as regards his status as innocent purchaser or mortgagee, 109 ALR 746.

What constitutes notice to subsequent purchaser of real property of option to purchase contained in unrecorded lease, 17 ALR2d 331.

Motor vehicle certificate of title or similar document as, in hands of one other than legal owner, indicia of ownership justifying

reliance by subsequent purchaser or mortgagee without actual notice of other interests, 18 ALR2d 813.

Rights as between purchaser of timber and subsequent vendee of land, 18 ALR2d 1150.

Relative rights in real property as between purchasers from or through decedent's heirs or devisees and unknown surviving spouse, 39 ALR2d 1082.

Knowledge or notice of inadequacy of consideration for conveyance in chain of title as affecting bona fide status of purchaser, 42 ALR2d 1088.

Relative rights as between purchaser of chattel from one who had previously bought it with stolen money, and victim of the theft, 62 ALR2d 537.

Right of vendee under executory land contract to lien for amount paid on purchase price as against subsequent creditors of or purchasers from vendor, 82 ALR3d 1040.

23-1-20. Interference with bona fide purchaser.

A bona fide purchaser for value without notice of an equity will not be interfered with by equity. (Orig. Code 1863, § 3025; Code 1868, § 3037; Code 1873, § 3092; Code 1882, § 3092; Civil Code 1895, § 3934; Civil Code 1910, § 4531; Code 1933, § 37-111.)

JUDICIAL DECISIONS

Section constitutes mandatory charge to jury. — Where this section is applicable to a case, and warranted both by the pleadings and the evidence, it should be given as a charge to the jury, even in the absence of a request. *Anderson v. Barron*, 208 Ga. 785, 69 S.E.2d 874 (1952).

A bona fide purchaser without notice acquires an unqualified legal right and title to the property purchased; and a court of equity has no jurisdiction to interfere with such vested legal right and title. *Gamble v. Brooks*, 170 Ga. 662, 153 S.E. 759 (1930).

Therefore, a bona fide purchaser for value, and without notice of an equity, will not be interfered with by a court of equity and this doctrine proceeds on the idea that the equity of the innocent purchaser is superior to that of the cestui que trust, who stands silently by and permits such purchaser to act to his own injury, or who is guilty of laches in not sooner asserting a mere secret equity. *Gamble v. Brooks*, 170 Ga. 662, 153 S.E. 759 (1930).

Plaintiff may not reform his deed because of mutual mistake, third party acquired her title subsequently to that deed and is an innocent purchaser without notice of such mistake. *Cox v. Zucker*, 214 Ga. 44, 102 S.E.2d 580 (1958).

Where the absolute title to property is apparently in a vendor or mortgagor, the vendee or mortgagee is protected, unless the one seeking to set up a lien or trust against the property can show that the vendee or mortgagee had notice of trust funds having gone into the property. *Tattnall Bank v. Harvey*, 186 Ga. 752, 198 S.E. 724 (1938).

While it is the rule that a bona fide purchaser of property in which trust funds have been invested is protected, the beneficiary of a trust estate may at his option, within a reasonable time, "affirm or reject an unauthorized investment by the trustee," and equity will aid the beneficiary in recovering the funds or property, or enforcing a lien for the wrongfully used funds, provided that the assets can be traced and remain in the hands of a person "affected with notice of the misapplication." *Tattnall Bank v. Harvey*,

186 Ga. 752, 198 S.E. 724 (1938).

While proof of payment of the purchase money alone raises a presumption of good faith, and carries the burden of claimant, where no testimony was introduced to prove that the consideration recited in the deed was in fact paid, nor was it otherwise proved to have been paid, the recital of the consideration in the deed and the recital therein that it was paid does not carry the burden of proving payment of the purchase money. *Pound v. Faulkner*, 193 Ga. 413, 18 S.E.2d 749 (1942).

The fact that the owner of the automobile, estranged from her husband, negligently allowed her husband to get possession of the keys and the automobile and to thereafter drive it to another city and sell it to a dealer in automobiles of the same make was not such an act as clothed the husband, who had no interest therein, with the external indicia of ownership and right of disposition, so as to enable him to pass the dealer such title to the automobile that the dealer could in turn give to a third-party purchaser clear title which would defeat the right of the true owner to recover the same in a trover action, nor did the act require a finding that the third-party purchaser was a bona fide purchaser for value without notice of any infirmity in the title to the automobile. *Arnold v. Conner*, 100 Ga. App. 503, 111 S.E.2d 638 (1959).

Where one purchases land at an administrator's sale duly authorized by order of the court of ordinary (now probate court), which land was in the possession of such administrator, his deed will not be canceled on the petition of parties claiming an equitable title to such land, of which equity the purchaser had no notice. *Beecher v. Carter*, 189 Ga. 234, 5 S.E.2d 648 (1939).

Where a purchaser of land from one in possession, who holds a deed thereto which is absolute on its face, has paid the purchase price and taken possession, parties claiming an equity therein of which the purchaser had no notice are not entitled to have the purchaser's deed canceled. *Beecher v. Carter*, 189 Ga. 234, 5 S.E.2d 648 (1939).

Where third-party purchasers of chattels were bona fide purchasers for value without notice of the chattel mortgages, it is not error to sustain their general demurrers (now motions to dismiss) to the mortgagee's petition for equitable foreclosure. *Morris & Eckels Co. v. Fulton Nat'l Bank*, 208 Ga. 222, 65 S.E.2d 815 (1951).

A purchaser of real estate is not bound by recitals in a deed executed by his grantor to realty not embraced in his purchase, and which, therefore, does not constitute a muniment in his chain of title. *Thompson v. Randall*, 173 Ga. 696, 161 S.E. 377 (1931).

Purchaser must retain bona fides until purchase money actually paid. — It is a rule in equity that a bona fide purchaser without notice, to be entitled to protection, must be so, not only at the time of the contract or conveyance, but until the purchase money is actually paid. *Ross v.*

Rambo, 195 Ga. 100, 23 S.E.2d 687 (1942).

A partial payment of the purchase money before notice of the equitable title of the true owners, although not sufficient to invest the vendee with the character of a bona fide purchaser as regards the entire estate purchased, will entitle him to invoke the aid of the equitable principle that he who asks equity must do equity and to be reimbursed for the amount actually paid before. *Ross v. Rambo*, 195 Ga. 100, 23 S.E.2d 687 (1942).

Cited in *Long v. Atlanta Trust Co.*, 164 Ga. 21, 137 S.E. 394 (1927); *Rountree v. Davis*, 90 Ga. App. 223, 82 S.E.2d 716 (1954); *Mathis v. Blanks*, 212 Ga. 226, 91 S.E.2d 509 (1956); *Ayers v. Carden*, 212 Ga. 510, 93 S.E.2d 694 (1956); *W.L. Schautz Co. v. Duncan Hosiery Mills, Inc.*, 218 Ga. 729, 130 S.E.2d 496 (1963); *Todd v. Conner*, 220 Ga. 173, 137 S.E.2d 614 (1964).

RESEARCH REFERENCES

ALR. — Pledgee of corporate stock as security for an antecedent debt as a bona fide purchaser within the rule which protects such purchasers against the equities of third persons, 9 ALR 1619.

Right of one who, with knowledge of outstanding equity, derived his interest in real property from or through a bona fide purchaser, to same protection as latter, 63 ALR 1362.

Bona fides of purchaser of bill or note on an executory consideration, 100 ALR 1357.

What constitutes notice to subsequent purchaser of real property of option to purchase contained in unrecorded lease, 17 ALR2d 331.

Motor vehicle certificate of title or similar document as, in hands of one other than legal owner, indicia of ownership justifying reliance by subsequent purchaser or mortgagee without actual notice of other interest, 18 ALR2d 813.

Rights as between purchaser of timber and subsequent vendee of land, 18 ALR2d 1150.

Relative rights in real property as be-

tween purchasers from or through decedent's heirs or devisees and unknown surviving spouse, 39 ALR2d 1082.

Extension of time or forbearance to sue as consideration constituting mortgagee bona fide purchaser, 39 ALR2d 1088.

Knowledge or notice of inadequacy of consideration for conveyance in chain of title as affecting bona fide status of purchaser, 42 ALR2d 1088.

Relative rights as between purchaser of chattel from one who had previously bought it with stolen money, and victim of the theft, 62 ALR2d 537.

Right to reformation of contract or instrument as affected by intervening rights of third persons, 79 ALR2d 1180.

Right to follow chattel into hands of purchaser who took in payment of preexisting debt, 11 ALR3d 1028.

Right of vendee under executory land contract to lien for amount paid on purchase price as against subsequent creditors of or purchasers from vendor, 82 ALR3d 1040.

23-1-21. Compulsion to litigate.

Equity will not force persons to litigate in order to have done what they ought to do and are willing to do voluntarily. (Civil Code 1895, § 3935; Civil Code 1910, § 4532; Code 1933, § 37-118.)

History of section. — This section is derived from the decisions in *Sperry & Niles v. Haslam*, 57 Ga. 412 (1876) and *Blalock v. Newhill*, 78 Ga. 245, 1 S.E. 383 (1887).

JUDICIAL DECISIONS

Cited in *Rowe v. Cole*, 176 Ga. 592, 168 S.E. 882 (1933); *Robertson v. Webster*, 79 Ga. App. 30, 52 S.E.2d 511 (1949); *Bell v. Fine Prods. Co.*, 139 Ga. App. 878, 229 S.E.2d 808 (1976).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Equity, § 15. **ALR.** — Mistake in lease as ground for relief, 26 ALR 472.

23-1-22. Interference with creditor.

A diligent creditor shall not needlessly be interfered with in the prosecution of his legal remedies. (Civil Code 1895, § 3942; Civil Code 1910, § 4539; Code 1933, § 37-121.)

History of section. — This section is derived from the decision in *Burgwyn Bros. Tobacco Co. v. Bentley & Co.*, 90 Ga. 508, 16 S.E. 216 (1892).

JUDICIAL DECISIONS

Compulsion to litigate generally. — Where grievance is not that Public Service Commission refuses to hear and act upon an application of the telephone company for increased rates, but that the commission, having so heard and acted thereon, has fixed rates that are confiscatory, mandamus could merely require that the commission act again in the exercise of that discretion vested in it by law. If the evidence shows that the rates ordered will result in confiscation, equity has jurisdiction to render the judgment complained of. Rates that are unjustly and unreasonably low are confiscatory. *Southern Bell Tel. & Tel. Co. v. Georgia Pub. Serv. Comm'n*, 203 Ga. 832, 49 S.E.2d 38 (1948).

Cited in *Saul v. Vaughn & Co.*, 240 Ga. 301, 241 S.E.2d 180 (1977).

23-1-23. Construction of conditions; relief against forfeitures.

Where the rules of construction will allow, equity seeks always to construe conditions subsequent into covenants and to relieve against forfeitures. (Orig. Code 1863, § 3048; Code 1868, § 3060; Code 1873, § 3115; Code 1882, § 3115; Civil Code 1895, § 3971; Civil Code 1910, § 4568; Code 1933, § 37-216.)

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION CONSTRUCTION GENERALLY FORFEITURES

General Consideration

Construction generally. — Where there are no express words of defeasance, forfeiture, or reversion, words in a deed will be construed as words of covenant and not words of condition. The remedy for a breach by one having the right to enforce the same is an action for damages and not a forfeiture of the estate for condition broken. *Fulford v. Fulford*, 225 Ga. 9, 165 S.E.2d 848 (1969); *Kitchens v. Atlantic Steel Co.*, 123 Ga. App. 812, 182 S.E.2d 530 (1971), *aff'd*, 228 Ga. 708, 187 S.E.2d 824 (1972).

Cited in *Grantham v. Royal Ins. Co.*, 34 Ga. App. 415, 130 S.E. 589, *cert. denied*, 34 Ga. App. 836 (1925); *Hardeman v. Ellis*, 162 Ga. 664, 135 S.E. 195 (1926); *A.C. Alexander Lumber Co. v. Bagley*, 184 Ga. 352, 191 S.E. 446 (1937); *Crisp County Lumber Co. v. Bridges*, 187 Ga. 484, 200 S.E. 777 (1939); *Golden v. National Life & Accident Ins. Co.*, 189 Ga. 79, 5 S.E.2d 198 (1939); *Simpson v. Blanchard*, 73 Ga. App. 843, 38 S.E.2d 634 (1946); *Churches Homes for Bus. Girls, Inc. v. Manget Foundation, Inc.*, 110 Ga. App. 539, 139 S.E.2d 138 (1964); *White v. Turbidity*, 227 Ga. 825, 183 S.E.2d 363 (1971); *Kiser v. Warner Robins Air Park Estates, Inc.*, 237 Ga. 385, 228 S.E.2d 795 (1976).

Construction Generally

Determination of condition precedent or subsequent. — While it is not always easy

to determine whether the condition created by the terms of a conveyance is precedent or subsequent, the general rule is that, if the act or condition required does not necessarily precede the vesting of the estate, but may accompany or follow it, and if the act may as well be done after as before vesting of the estate, or if from the nature of the act to be performed, it is evidently the intention of the parties that the estate shall vest and the grantee perform the act taking possession, then the condition is subsequent. *Gordon v. Whittle*, 206 Ga. 339, 57 S.E.2d 169 (1950).

If, upon a strict construction of a deed in its entirety (there being no express words of defeasance), it should be doubtful whether the instrument created an estate upon condition subsequent, or the words employed imported covenant, the latter construction should be adopted. *Fulford v. Fulford*, 225 Ga. 9, 165 S.E.2d 848 (1969).

Where a deed purports to convey a fee simple title and there is no provision in the deed for a forfeiture of the estate or a reversion to the grantor in the event the grantee conveyed the property to another without the consent of his brothers, restrictive words in the deed are words of covenant and not a condition subsequent. *Fulford v. Fulford*, 225 Ga. 9, 165 S.E.2d 848 (1969).

A deed will not be construed as a grant on condition subsequent unless the language used by express terms creates an

estate on condition or unless the intent of the grantor to create a conditional estate is manifest from a reading of the entire instrument. *Gordon v. Whittle*, 206 Ga. 339, 57 S.E.2d 169 (1950); *Fulford v. Fulford*, 225 Ga. 9, 165 S.E.2d 848 (1969); *Floyd v. Hoover*, 141 Ga. App. 588, 234 S.E.2d 89 (1977).

Deed that the grantor, in consideration of payment by grantees of certain indebtedness and of their support and maintenance of him during the remainder of his life, conveyed the described premises, did not create a condition subsequent which, upon the failure of the grantees to support and maintain the grantor, would result in a forfeiture of the estate conveyed, but such language created a covenant binding the grantees therein to perform; upon their failure to perform, if the grantor had been in life, he might have rescinded the contract by restoring to the grantees that part of the consideration represented by the payment of his indebtedness, offset by any profits they might have derived from the conveyance to them. *Jones v. Reid*, 184 Ga. 764, 193 S.E. 235 (1937).

Provision in deed that title "reverts back to the grantor if the grantee denies grantor her right to live on said property with him as his wife or without him" created a valid condition subsequent, and stipulated in terms that a breach of such condition by the grantee husband would cause the title to revert; and this would give to the grantor wife the right of reentry; however, if performance by the husband of such a condition subsequent was made impossible by acts or conduct on the part of the wife herself, the rule would be otherwise. *Turner v. Turner*, 186 Ga. 223, 197 S.E. 771 (1938).

Forfeitures

Courts do not generally favor forfeitures and this rule is applicable to insurance contracts. *Cotton States Mut. Ins. Co. v. Torrance*, 110 Ga. App. 4, 137 S.E.2d 551 (1964), *aff'd*, 220 Ga. 639, 140 S.E.2d 840 (1965).

But while forfeitures are not favored, they are not altogether prohibited in this state. *Cotton States Mut. Ins. Co. v. Torrance*, 110 Ga. App. 4, 137 S.E.2d 551 (1964), *aff'd*, 220 Ga. 639, 140 S.E.2d 840 (1965).

Conditions subsequent in deeds, although not favored, will be enforced by the court when they are clearly created and are not inconsistent with the other terms of the conveyance, and are not rendered impossible by the act of God or by the subsequent conduct of the grantor. *Evans v. Brown*, 196 Ga. 364, 27 S.E.2d 300 (1943).

While forfeitures are not unlawful, the law does not favor them, and all ambiguities in a contract are to be resolved against their existence; but where a contract in unmistakable terms provides for a forfeiture, and is otherwise free from legal infirmity, neither a court of law nor a court of equity will relieve against the forfeiture. *Cotton States Mut. Ins. Co. v. Torrance*, 110 Ga. App. 4, 137 S.E.2d 551 (1964), *aff'd*, 220 Ga. 639, 140 S.E.2d 840 (1965).

The condition subsequent, with right of reentry, and forfeiture of the estate conveyed grantee, is not void because it could work a forfeiture. If a valid limitation imposed against alienation is interwoven with, so as to constitute a part of, the grant itself, the grant will be treated as a defeasible estate, and upon the inhibition being violated the estate conveyed is forfeited and terminates. *Floyd v. Hoover*, 141 Ga. App. 588, 234 S.E.2d 89 (1977).

Conditions in a deed which tend to destroy an estate are not favored in law and such conditions must be strictly construed against forfeiture. *Kitchens v. Atlantic Steel Co.*, 123 Ga. App. 812, 182 S.E.2d 530 (1971), *aff'd*, 228 Ga. 708, 187 S.E.2d 824 (1972).

Where there is a breach of a covenant which authorizes the forfeiture of the lease, the prompt assertion thereof by the lessor will operate to defeat the lessee's privilege to renew, however, forfeitures by acts of a party to a lease because of a breach of a covenant or condition are not favored by the courts. *Pritchett v. King*, 56 Ga. App. 788, 194 S.E. 44 (1937).

The general rule is that the breach by a lessee of the covenants or stipulations on his part contained in the lease does not work a forfeiture of the term in the absence of an express proviso to that effect in the lease, the lessor's remedy being by way of a claim for damages. *Pritchett v. King*, 56 Ga. App. 788, 194 S.E. 44 (1937).

Where a contract does not provide in express terms for a forfeiture upon a breach of the covenant, the presumption is that the lessor will be content with such

right as is conferred by the ordinary remedies. *Pritchett v. King*, 56 Ga. App. 788, 194 S.E. 44 (1937).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Equity, §§ 74-83.

C.J.S. — 30 C.J.S., Equity, § 56 et seq.

ALR. — Distinction between condition and covenant in grant of land for church purposes, 7 ALR 1429.

Relief of purchaser against forfeiture of land contract, 40 ALR 182.

Constitutionality of statute relieving against forfeiture of bail or recognizance, 43 ALR 1233.

Continued use of property for burial purposes as a condition subsequent of a conveyance of dedication of land for that purpose, 47 ALR 1174.

Covenant in mining lease to develop property as affected by provisions for delay rental, 67 ALR 221.

Commencement of development within fixed term as extending term of oil and gas lease, 67 ALR 526.

Validity and effect of covenant by lessee, as regards his activities after expiration of lease, 122 ALR 1031.

Execution of new lease as within contemplation of option for extension or renewal of lease, 172 ALR 1205.

Mistake, accident, inadvertence, etc., as ground for relief from termination or forfeiture of oil or gas lease for failure to complete well, commence drilling, or pay rental, strictly on time, 5 ALR2d 993.

Relief against forfeiture of lease for nonpayment of rent, 31 ALR2d 321.

Waiver of, or estoppel to assert, condition subsequent or its breach, 39 ALR2d 1116.

Enforcement of, or waiver of or estoppel to assert, forfeiture clause of lease made or held by cotenants as lessors, 50 ALR2d 1365.

23-1-24. When election between benefits compelled.

A case of election arises whenever a person is entitled to one of two benefits, to each of which he has legal title; but the enforcement of both would be unconscionable and inequitable to others having claims upon the same property or fund. In such cases equity may compel an election. (Orig. Code 1863, § 3092; Code 1868, § 3104; Code 1873, § 3161; Code 1882, § 3161; Civil Code 1895, § 4012; Civil Code 1910, § 4609; Code 1933, § 37-501.)

Cross references. — As to elections relating to deeds, see § 44-5-37. As to elections relating to wills, see § 53-2-111 et seq.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
COMPULSION TO ELECT

General Consideration

For discussion of doctrine of election by legatee, see *State Banking Co. v. Hinton*, 178 Ga. 68, 172 S.E. 42 (1933).

Sections 53-2-111, 53-2-112 and this section must be construed together, and be considered in the light of the decisions of the Supreme Court and equitable rules as to when a legatee will be compelled to elect. *Rieves v. Smith*, 184 Ga. 657, 192 S.E. 372 (1937).

While the general basis and effect of the doctrine of election is stated in broad and general terms by § 53-2-111, and if a legatee accepts a benefit under the will he must adopt the whole contents of the instrument, conforming to all its provisions, and renouncing any right inconsistent with it, such a case for an election does not arise except where the conditions stated in § 53-2-112 and this section exist. *Rieves v. Smith*, 184 Ga. 657, 192 S.E. 372 (1937).

The principles stated in § 18-2-2 and this section do not mean that a creditor having a priority against a fund in court can be required to relinquish his direct claim thereon, and proceed at his own additional expense with delay in an independent suit upon an indemnifying bond from the debtor, which does not by its terms protect the creditor seeking to compel such election. *Savannah Bank & Trust Co. v. Meldrim*, 195 Ga. 765, 25 S.E.2d 567 (1943).

Determination of ownership required prior to election. — A plaintiff would not be compelled to elect between a legacy and a "mere claim" to property until after there has been an adjudication of the question whether or not he is in fact the owner of an interest in the property disposed of by the will, and then only in the event this issue is determined in his favor; since, if he were first compelled to elect, and he should for any reason fail in the trial to establish his

claim, there would be no defeated or disappointed legatees to compensate, but, on the contrary, the other legatees would get the very property he claimed. *Rieves v. Smith*, 184 Ga. 657, 192 S.E. 372 (1937).

Cited in *Federal Land Bank v. Farmers' & Merchants' Bank*, 177 Ga. 505, 170 S.E. 504 (1933); *State Banking Co. v. Hinton*, 178 Ga. 68, 172 S.E. 42 (1933); *Head v. Scruggs*, 178 Ga. 324, 173 S.E. 113 (1934); *Brown v. Smith*, 50 Ga. App. 332, 178 S.E. 180 (1935); *Irwin v. Willis*, 202 Ga. 463, 43 S.E.2d 691 (1947).

Compulsion to Elect

Election is choice between proffered benefit and retention of own property. — An "election" in equity is a choice which a person is compelled to make between the acceptance of a benefit under an instrument and the retention of his own property which is attempted to be disposed of by that instrument. *Rieves v. Smith*, 184 Ga. 657, 192 S.E. 372 (1937).

The doctrine of election as applied to wills, against one claiming inconsistent benefits, arises when the testator "has attempted to give property not his own, and has given a benefit to a person to whom that property belongs," in which case "the devisee or legatee shall elect either to take under or against the will." It is applicable where the instrument confers upon one a benefit while attempting to dispose of his own property, in which event such person must elect whether to accept the benefit under the instrument or retain his property. However, this doctrine does not apply where testamentary disposition describes no specific property so as to identify it with that of the claimant, but describes the property only generally, as "all my real and personal property and all property of every kind and character owned by me at my death," since the testator would be presumed to have intended to bequeath only what he actually owned and could lawfully

dispose of. *First Nat'l Bank & Trust Co. v. Roberts*, 187 Ga. 472, 1 S.E.2d 12 (1939).

A case of election only arises when a person is entitled to one of two benefits to each of which he has the legal title, and an election can exist only where there is a choice between two or more inconsistent remedies actually existing at the time of election. *Rieves v. Smith*, 184 Ga. 657, 192 S.E. 372 (1937).

The choice is compulsory between two inconsistent rights or claims where there is a clear intention of the testator that the beneficiary shall not enjoy both. *Rieves v. Smith*, 184 Ga. 657, 192 S.E. 372 (1937).

Where a testator, after devising property owned by him to one beneficiary, assumes to devise to another property belonging to the first devisee, the devisee of the property owned by the testator, if he accepts the devise with knowledge of the facts, is

precluded from asserting a claim to his own property devised to the other beneficiary. The beneficiary must elect between keeping his own and taking what is given by the will. *Rieves v. Smith*, 184 Ga. 657, 192 S.E. 372 (1937).

The fact that a sheriff who had collected taxes which were unaccounted for, had given a bond with a surety, conditioned on the faithful performance of his duties, would not create a case for compulsory election, so as to require the county officials claiming the tax moneys to relinquish, for the benefit of a creditor bank, their direct claim of priority from the funds of the decedent in the registry of the court, and to proceed, with delay and additional expense, by a suit on the bond. *Savannah Bank & Trust Co. v. Meldrim*, 195 Ga. 765, 25 S.E.2d 567 (1943).

RESEARCH REFERENCES

C.J.S. — 28 C.J.S., Election of Remedies, § 2.

ALR. — A provision in land contract for pecuniary forfeiture or penalty by a party is default as affecting the right of the other party to specific performance, 32 ALR 584; 98 ALR 877.

Election of remedies: inconsistency of action for damages for fraud and suit to establish constructive trust based on same transaction, 43 ALR 177.

Attempt to reform contract as election of remedies precluding action to enforce contract as written or vice versa, 49 ALR 1513.

Revocation of election to take under or contrary to will, 81 ALR 740; 71 ALR2d 942.

Election of remedies by owner against public authority or corporation having power of eminent domain which unauthorizedly enters land without instituting valid eminent domain proceedings, 101 ALR 373.

What amounts to widow's election as between antenuptial or postnuptial settlement and husband's will or her rights under statute of descent and distribution, or attack by her upon such settlement, 117 ALR 1001.

Judgment for debt without foreclosure of mortgage securing it as affecting mortgage, or right to foreclose the same, where no execution or attachment is levied under the judgment, 121 ALR 917.

Bank depositor's act in seeking restitution from third person to whom, or for benefit of whom, the bank has paid out the deposit, as election of remedy precluding action against bank, 144 ALR 1440.

Notice of rescission as irrevocable election when other party refuses to assent thereto, 1 ALR2d 1084.

Conclusive election of remedies as predicated on commencement of action, or its prosecution short of judgment on the merits, 6 ALR2d 10.

Election to take against will as extinguishing power of appointment, 38 ALR2d 977.

Factors considered in making election for incompetent to take under or against will, 3 ALR3d 6.

Time within which election must be made for incompetent to take under or against will, 3 ALR3d 119.

Conflict of laws regarding election for or against will, and effect in one jurisdiction of election in another, 69 ALR3d 1081.

23-1-25. Laches.

Equity gives no relief to one whose long delay renders the ascertainment of the truth difficult, even when no legal limitation bars the right. (Orig. Code 1863, § 3027; Code 1868, § 3039; Code 1873, § 3094; Code 1882, § 3094; Civil Code 1895, § 3939; Civil Code 1910, § 4536; Code 1933, § 37-119.)

Cross references. — As to authority of courts of equity to interpose equitable bar owing to lapse of time and laches of com-

plainant, see § 9-3-3. As to tolling of limitations due to fraud of defendant or those under whom he claims, see § 9-3-96.

JUDICIAL DECISIONS**ANALYSIS****GENERAL CONSIDERATION****EQUITABLE DEMANDS MUST BE ASSERTED WITHIN REASONABLE TIME****LACHES BASED ON INEQUITY****PLEADING AND PRACTICE****General Consideration**

The equitable doctrine of laches is not applicable to suits at law. Columbus Bank & Trust Co. v. Dempsey, 120 Ga. App. 5, 169 S.E.2d 349 (1969).

Equity will relieve against mutual mistake, but only at the instance of a complainant who moves with reasonable diligence. What is a reasonable time must necessarily depend upon the peculiar facts and environments of the particular case. Parker v. Fisher, 207 Ga. 3, 59 S.E.2d 715 (1950).

And if both parties are equally to blame for delay, neither should be allowed to invoke the rule of laches in order to gain advantage over his adversary. City of McRae v. Folsom, 191 Ga. 272, 11 S.E.2d 900 (1940). Davis v. Newton, 217 Ga. 75, 121 S.E. 153 (1961).

Cited in Griffin v. Haden, 172 Ga. 478, 157 S.E. 686 (1931); Freeney v. Pape, 185 Ga. 1, 194 S.E. 515 (1937); Kinney v. Mayor of Milledgeville, 185 Ga. 866, 196 S.E. 467 (1938); Wright v. City of Metter, 192 Ga. 75, 14 S.E.2d 443 (1941); Miller v. Everett, 192 Ga. 26, 14 S.E.2d 449 (1941); Grant v. Hart, 192 Ga. 153, 14 S.E.2d 860 (1941); Gunby v. Turner, 194 Ga. 378, 21 S.E.2d 640 (1942); Lankford v. Holton, 195

Ga. 317, 24 S.E.2d 292 (1943); Williams v. Porter, 202 Ga. 113, 42 S.E.2d 475 (1947); Larkins v. Boyd, 205 Ga. 69, 52 S.E.2d 307 (1949); Calhoun County v. Early County, 205 Ga. 169, 52 S.E.2d 854 (1949); Gay v. Radford, 207 Ga. 38, 59 S.E.2d 915 (1950); Flannagan v. Clark, 207 Ga. 345, 61 S.E.2d 485 (1950); Barron v. Darden, 207 Ga. 350, 61 S.E.2d 497 (1950); Vinson v. Citizens & S. Nat'l Bank, 208 Ga. 813, 69 S.E.2d 866 (1952); Todd v. Bivins, 215 Ga. 402, 110 S.E.2d 768 (1959); Consumers Financing Corp. v. Lamb, 218 Ga. 343, 127 S.E.2d 914 (1962); Fuller v. Fuller, 107 Ga. App. 429, 130 S.E.2d 520 (1963); Blackstock v. Murphy, 220 Ga. 661, 140 S.E.2d 902 (1965); Brown v. Granite Holding Corp., 221 Ga. 560, 146 S.E.2d 289 (1965); Fuller v. McBurrows, 229 Ga. 422, 192 S.E.2d 144 (1972); Gauker v. Eubanks, 230 Ga. 893, 199 S.E.2d 771 (1973); Sikes v. Sikes, 231 Ga. 105, 200 S.E.2d 259 (1973); Wilson v. Passmore, 240 Ga. 716, 242 S.E.2d 124 (1978).

Equitable Demands Must Be Asserted Within Reasonable Time

There is no principle of equity sounder, more conservative and more prolific, in all the fruits of peace, than this: that he who slumbers over his rights, with no

impediment to his asserting them, until the evidence upon which a counterclaim is founded, may from lapse of time, be presumed to be lost; until the generation cognizant of the transactions between the parties, has passed away, and until original actors are in their graves, and their affairs are left to representatives — the law, in the exercise of an equitable sovereignty, presumes it to be unjust, that under such circumstances, a complainant should be heard; and in nine cases out of ten, it is unjust in fact, as well as in theory. The principle upon which courts of equity proceed in such cases, is, that the lateness of the demand, arising from lapse of time, is presumptive evidence against its justice. *Welch v. Welch*, 215 Ga. 198, 109 S.E.2d 757 (1959).

Equity will not aid in the enforcement of stale demands. *Cannon v. Fulton Nat'l Bank*, 206 Ga. 609, 57 S.E.2d 917 (1950); *Phillips v. Hayes*, 212 Ga. 148, 81 S.E.2d 19 (1956); *Welch v. Welch*, 215 Ga. 198, 109 S.E.2d 757 (1959).

The rule that equity will not aid in the enforcement of stale demands applies to accounts. *Cannon v. Fulton Nat'l Bank*, 206 Ga. 609, 57 S.E.2d 917 (1950).

In a suit to rescind the sale of land, the plaintiff's voluntary failure to bring suit for three years after being fully cognizant of the fraud committed seven years prior thereto is such laches as will bar his action. *Hillis v. Clark*, 222 Ga. 604, 150 S.E.2d 922 (1966).

Where no legal redemption of the land is alleged, or claimed, but the redemption is entirely an equitable one, persons claiming thereunder must assert their equitable demands within a reasonable time, for since equity rewards the vigilant, not the slothful, where the delay is such as to render the ascertainment of the truth difficult, equity will give no relief. *Slade v. Barber*, 200 Ga. 405, 37 S.E.2d 143 (1946).

Even after the dissolution of a partnership, the statute of limitations does not begin to run in favor of one partner against another until the partnership affairs, as to debtors and creditors of the firm, have been wound up and settled, or, at least, a sufficient time has elapsed since the dissolution to raise the presumption that such was the fact, nor, while there are

outstanding assets and liabilities, will a partner be barred as against his copartner, on the principle of stale demands. *Powell v. Powell*, 171 Ga. 840, 156 S.E. 677 (1931), later appeal, 179 Ga. 817, 177 S.E. 566 (1934).

There is no absolute rule as to what constitutes laches or staleness of demand, and no one decision constitutes a precedent in the strict sense for another. Each case is to be determined according to its own particular circumstances. Laches is not, like limitations, a mere matter of time, but principally a question of the inequity of permitting the claim to be enforced, an inequity founded on some intermediate change in conditions. *Bleckley v. Bleckley*, 189 Ga. 47, 5 S.E.2d 206 (1939); *Yablon v. Metropolitan Life Ins. Co.*, 200 Ga. 693, 38 S.E.2d 534 (1946).

Laches is not, like limitations, a mere matter of time, but is principally a question of the inequity of permitting the claim to be enforced, an inequity founded on some intermediate change in conditions. *Cooper v. Aycock*, 199 Ga. 658, 34 S.E.2d 895 (1945).

And in determining whether there has been laches, there are various things to be considered, notably the duration of the delay in asserting the claim, and the sufficiency of the excuse offered in extenuation of the delay, whether plaintiff acquiesced in the assertion or operation of the corresponding adverse claim, the character of the evidence by which plaintiff's right is sought to be established, whether during the delay the evidence of the matters in dispute has been lost or become obscured or the conditions have so changed as to render the enforcement of the right inequitable, whether third persons have acquired intervening rights. *Citizens' & S. Nat'l Bank v. Ellis*, 171 Ga. 717, 156 S.E. 603 (1931); *Johnson v. Sears*, 199 Ga. 432, 34 S.E.2d 541 (1945); *Cooper v. Aycock*, 199 Ga. 658, 34 S.E.2d 895 (1945); *Parker v. Fisher*, 207 Ga. 3, 59 S.E.2d 715 (1950); *Welch v. Welch*, 215 Ga. 198, 109 S.E.2d 757 (1959); *Erhart v. Brooks*, 231 Ga. 272, 201 S.E.2d 464 (1973).

Delay in bringing suit must not be such as to preclude the court from arriving at a safe conclusion as to the truth of the matters in controversy, and thus make the

doing of equity either doubtful or impossible, due to loss or obscuration of evidence of the transaction in issue, or where the lapse of time has been sufficient to create or justify a presumption that, if the plaintiff was ever possessed of a right, it had been abandoned, waived, or satisfied. *Citizens' & S. Nat'l Bank v. Ellis*, 171 Ga. 717, 156 S.E. 603 (1931); *Flemister v. Billups*, 202 Ga. 132, 42 S.E.2d 376 (1947); *Welch v. Welch*, 215 Ga. 198, 109 S.E.2d 757 (1959).

While most frequently the bar of laches is applied in instances where the long delay has rendered the ascertainment of the truth difficult, the doctrine does not rest on that premise alone. *Johnson v. Sears*, 199 Ga. 432, 34 S.E.2d 541 (1945).

An unreasonable delay until the death of essential witnesses, which practically precludes the court from arriving at a safe conclusion as to the truth of the matters in controversy, and which make the doing of equity either doubtful or impossible, due to loss or obscuration of evidence of the transaction in issue, will bar the action. *Stephens v. Walker*, 193 Ga. 330, 18 S.E.2d 537 (1942).

While most frequently the bar of laches is applied in instances where the long delay has rendered the ascertainment of the truth difficult, the doctrine does not rest on that premise alone. *Bryan v. Willingham-Little Stone Co.*, 194 Ga. 563, 22 S.E.2d 40 (1942).

Petition showing affirmatively that the plaintiffs were guilty of laches in not seeking for 18 years the cancellation of deeds conveying property in their mother's estate was properly dismissed on general demurrer (now motion to dismiss). *Johnson v. Sears*, 199 Ga. 432, 34 S.E.2d 541 (1945).

A delay of 40 years or more, and the death of essential witnesses, when the truth of matters in controversy cannot be fairly established, makes the doing of equity either doubtful or impossible, and will bar the action. *Slade v. Barber*, 200 Ga. 405, 37 S.E.2d 143 (1946).

Death of essential witnesses, which may preclude the court from arriving at a safe conclusion as to the truth of matters in controversy, and which makes the doing of equity doubtful or impossible, will bar the

action. *Whitfield v. Whitfield*, 204 Ga. 64, 48 S.E.2d 852 (1948).

To charge a party with laches in delaying to assert a right, an opportunity to have acted sooner must have existed; if he acted at the first possible opportunity, he is not culpable. *Cooper v. Aycock*, 199 Ga. 658, 34 S.E.2d 895 (1945).

In a suit to cancel a deed on the ground of the grantor's insanity, when no reason appeared why the plaintiffs did not know, or by the slightest diligence could not have known, of the substantial facts, so as to bring the suit within a reasonable time after the deed was executed and after the grantor's death, the action was properly dismissed on demurrer (now motion to dismiss) on the ground that it was stale and that the plaintiffs were in laches. *Hillis v. Clark*, 222 Ga. 604, 150 S.E.2d 922 (1966).

To prevail on a plea of laches, it is essential that the pleading party prove harm caused him by the delay. *Clover Realty Co. v. J.L. Todd Auction Co.*, 240 Ga. 124, 239 S.E.2d 682 (1977).

The defendant's plea of laches in a suit brought to enjoin the defendant from extending a parking area onto land zoned for single family dwellings, cannot be sustained, where no facts are alleged to show any prejudice to the defendant, or that the ascertainment of the truth is made more difficult by any delay on the part of the plaintiffs to immediately seek relief against the defendant for the unlawful use of his property. *Palmer v. Tomlinson*, 217 Ga. 399, 122 S.E.2d 578 (1961).

Delay alone is never enough to show laches where there is an applicable statute of limitations. *Clover Realty Co. v. J.L. Todd Auction Co.*, 240 Ga. 124, 239 S.E.2d 682 (1977).

And a delay is excusable when it was induced by the adverse party; he cannot take advantage of a delay which he himself has caused or to which he has contributed. *City of McRae v. Folsom*, 191 Ga. 272, 11 S.E.2d 900 (1940).

Laches Based on Inequity

Laches is not, like limitations, a mere matter of time, but principally a question of the inequity of permitting the claim to be enforced, an inequity founded on some intermediate change in conditions. *Yablon*

v. Metropolitan Life Ins. Co., 200 Ga. 693, 38 S.E.2d 534 (1946); *Whitfield v. Whitfield*, 204 Ga. 64, 48 S.E.2d 852 (1948).

Laches does not arise from mere lapse of time. *Columbus Bank & Trust Co. v. Dempsey*, 120 Ga. App. 5, 169 S.E.2d 349 (1969).

And in fixing the time when the bar of laches may be interposed, the court does not measure altogether by the lapse of time, because this section declares that: "Equity gives no relief to one whose long delay renders the ascertainment of the truth difficult, though no legal limitation bars the right." *Bass v. Mayor of Milledgeville*, 180 Ga. 156, 178 S.E. 529 (1934), appeal dismissed, 295 U.S. 721, 55 S. Ct. 926, 79 L. Ed. 1675 (1935).

Laches is an equitable doctrine which is independent of the statute of limitations, and as to the lapse of time necessary for invoking the doctrine of laches, such time may or may not correspond with the time specified in the statute of limitations. *Prudential Ins. Co. v. Sailors*, 69 Ga. App. 628, 26 S.E.2d 557 (1943); *Johnson v. Sears*, 199 Ga. 432, 34 S.E.2d 541 (1945).

But courts of equity may act in obedience and analogy to statutes of limitation. — While the equitable doctrine of laches operates independently of any statute of limitations, courts of equity usually act in obedience and in analogy to the statutes of limitations, in cases where it would not be unjust and inequitable to do so. *Cooper v. Aycock*, 199 Ga. 658, 34 S.E.2d 895 (1945).

Lapse of time is an important element of laches; yet, unless a case falls within the operation of a statute of limitations, there is no fixed period within which a person must assert his claim or be barred by laches; the length of time depends on the circumstances of the particular case. *Cooper v. Aycock*, 199 Ga. 658, 34 S.E.2d 895 (1945).

The period from which laches is determined is fixed in equity cases according to the circumstances of each case. *Bryan v. Willingham-Little Stone Co.*, 194 Ga. 563, 22 S.E.2d 40 (1942).

The doctrine of laches not only forbids relief to one whose long delay renders the ascertainment of truth difficult, though no legal limitation bars the right, but also authorizes equity to interpose an equitable

bar, whenever, from the lapse of time and laches of the complainant, it would be inequitable to allow a party to enforce his legal rights. *Goodwin v. First Baptist Church*, 225 Ga. 448, 169 S.E.2d 334 (1969), later appeal, 226 Ga. 524, 175 S.E.2d 868 (1970).

In an equitable suit to obtain possession of lands, under a rule analogous to the rule of law permitting title by adverse possession to be acquired in seven years under color of title, claimants would be barred after such time by their laches. *Slade v. Barber*, 200 Ga. 405, 37 S.E.2d 143 (1946).

On an equitable petition seeking merely a cancellation of a deed, although "equity follows the analogy of the law" in allowing the seven-year period of limitation, this time is permitted only if there are no special circumstances demanding an earlier application, and where such circumstances exist, calling for an interposition of the equitable doctrine of laches, equity will refuse relief to one whose long delay renders the ascertainment of the truth difficult, though no legal limitation bars the right. *Stephens v. Walker*, 193 Ga. 330, 18 S.E.2d 537 (1942).

The rules of limitation do not apply if the defendant, or those under whom he claims, has been guilty of a fraud by which the plaintiff shall have been debarred or deterred from his action. In such a case the period of limitation shall run only from the time of the discovery of the fraud, and equity applies a similar rule as to laches. *Stephens v. Walker*, 193 Ga. 330, 18 S.E.2d 537 (1942).

The statute of limitations is a statute of repose. When a person is defrauded, and has knowledge of the fraud, he must ask redress, if at all, within the period of limitation. If he waits for a longer period, he is bound by his laches. *Slade v. Barber*, 200 Ga. 405, 37 S.E.2d 143 (1946).

Fraud, which should have been discovered if usual and reasonable diligence had been exercised, is not a good reply to the statute of limitations. *Slade v. Barber*, 200 Ga. 405, 37 S.E.2d 143 (1946).

A general allegation of fraud amounts to nothing. — It is necessary that the complainant show, by specifications, wherein the fraud consists in order to prevent the application of laches against him. Issuable

facts must be charged. *Welch v. Welch*, 215 Ga. 198, 109 S.E.2d 757 (1959).

Pleading and Practice

Defense of laches must be alleged. — A petition is not demurrable (now subject to motion to dismiss) on the ground of laches on the part of the petitioner, where nothing in the petition authorizes the inference that there was any delay on the petitioner's part, suit being brought within the statute of limitations, which rendered the ascertainment of the truth more difficult, or in any way hindered the defendant city in making its defense. *Vickers v. City of Fitzgerald*, 216 Ga. 476, 117 S.E.2d 316 (1960).

Laches is an equitable defense, and a petition for equitable relief is not subject to demurrer (now motion to dismiss) on the ground of laches unless the allegations of fact affirmatively show such defense. *Henderson v. Henderson*, 219 Ga. 310, 133 S.E.2d 251 (1963).

And plaintiff must prove absence of laches. — Where the petition affirmatively shows that there has been unusual and unreasonable delay in bringing the action, it is incumbent upon the plaintiffs to show that they were not guilty of laches. *Hillis v. Clark*, 222 Ga. 604, 150 S.E.2d 922 (1966).

It is incumbent on the plaintiff, in order to repel the presumption of unreasonable delay, to allege in his petition the impediments to an earlier prosecution of his claim. *Parker v. Fisher*, 207 Ga. 3, 59 S.E.2d 715 (1950).

Where it cannot be said as a matter of law that the plaintiff was dilatory in asserting his claim, then the defense of laches is a question for the jury and summary judgment cannot be granted the defendant on the issue. *Davidson Mineral Properties, Inc. v. Gifford-Hill & Co.*, 235 Ga. 176, 219 S.E.2d 133 (1975).

A plaintiff's right to recover his share of the remainder estate is a plain statutory right not subject to the bar of laches. *Perkins v. First Nat'l Bank*, 221 Ga. 82, 143 S.E.2d 474 (1965).

One in possession of land is not chargeable with laches in failing to bring suit to cancel deeds. *Marietta Realty & Dev. Co. v. Reynolds*, 189 Ga. 147, 5 S.E.2d 347 (1939); *Davis v. Newton*, 217 Ga. 75, 121 S.E.2d 153 (1961).

One who is in possession of property under a claim of ownership will not be guilty of laches for delay in resorting to a court of equity to establish his rights. *Davis v. Newton*, 215 Ga. 58, 108 S.E.2d 809 (1959).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Equity, §§ 93, 152-156, 159-176.

C.J.S. — 30 C.J.S., Equity, § 100. 31 C.J.S., Equity, § 113 et seq.

ALR. — Laches as affecting right of corporation or its stockholders to relief against directors for violations of trust, 10 ALR 370.

Laches as preventing recovery of property diverted from one religious sect or denomination to another, 18 ALR 692.

Check in payment of interest or installment of principal as tolling statute of limitations, 28 ALR 84; 125 ALR 271.

Institution of suit as relieving one of charge of laches precluding relief in equity, 43 ALR 921.

Effect of recovery of judgment on unfiled or abandoned claim after expiration of time allowed for filing claim

against estate, 60 ALR 736.

What amounts to laches or delay on part of wife or widow in attacking antenuptial settlement which will prevent relief, 74 ALR 559.

Right to equitable relief from usury as affected by laches, 111 ALR 126.

Applicability of statute of limitations or doctrine of laches as between husband and wife, 121 ALR 1382.

Statute of limitations or presumption of payment from lapse of time as ground for affirmative relief from debt or lien, 164 ALR 1387.

Workers' compensation: time and jurisdiction for review, reopening, modification, or reinstatement of award or agreement, 165 ALR 9.

Pleading laches, 173 ALR 326.

Delay of stockholders in exercising their right to convert their stock into other class of stock or corporate obligation, 10 ALR2d 587.

Laches or delay in bringing suit as affecting right to enforce restrictive building covenants, 12 ALR2d 394.

Applicability of statute of limitations or laches to quo warranto proceedings, 26 ALR2d 828.

Laches as precluding cancellation of or other relief against release for personal injuries, 34 ALR2d 1314.

What constitutes sufficient repudiation

of express trust by trustee to cause statute of limitations to run, 54 ALR2d 13.

Applicability of statute of limitations or doctrine of laches to proceeding to revoke license to practice medicine, 63 ALR2d 1080.

Delay in asserting contractual right to arbitration as precluding enforcement thereof, 25 ALR3d 1171.

Estoppel or laches precluding lawful spouse from asserting rights in decedent's estate as against putative spouse, 81 ALR3d 110.

CHAPTER 2

GROUNDS FOR EQUITABLE RELIEF

Article 1

General Provisions

- Sec.
- 23-2-1. When equity will set aside judgment.
- 23-2-2. Setting aside sale or contract for inadequate consideration.
- 23-2-3. Payment of lost bonds or notes.

Article 2

Accident and Mistake

- 23-2-20. Which accidents relievable in equity.
- 23-2-21. What mistakes relievable in equity; power to relieve to be exercised cautiously.
- 23-2-22. Mistake of law in instrument — By contracting parties.
- 23-2-23. Same — By agent.
- 23-2-24. When mistake of fact relieved.
- 23-2-25. Form of conveyance contrary to intent.
- 23-2-26. Accident or mistake in execution of power.
- 23-2-27. When equitable interference not authorized — Mere ignorance of law.
- 23-2-28. Same — Mutual ignorance of fact; mistake in judgment of value.
- 23-2-29. Same — Failure to exercise diligence; ignorance of fact absent fraud.
- 23-2-30. Reformation and execution of contract in case of mistake distinguished.
- 23-2-31. Rescission for unilateral mistake of fact.
- 23-2-32. When negligent complainant granted relief.
- 23-2-33. Mere volunteers, in general; exception for executed contracts.
- 23-2-34. Relief against original parties or privies; exception.

Article 3

Fraud

- Sec.
- 23-2-50. Concurrent jurisdiction over fraud.
- 23-2-51. Fraud as actual or constructive.
- 23-2-52. Misrepresentation as legal fraud.
- 23-2-53. Suppression of fact as fraud.
- 23-2-54. Surprise as a form of fraud.
- 23-2-55. Use of similar trademarks, etc.
- 23-2-56. Consummation of fraud.
- 23-2-57. Proving existence of fraud.
- 23-2-58. Confidential relations defined.
- 23-2-59. Acquisition of antagonistic rights by one in confidential relationship.
- 23-2-60. Annulment of conveyances for fraud; relief against awards, judgments, and decrees.

Article 4

Accounting of Funds, Goods, etc.

- 23-2-70. Scope of equity jurisdiction over matters of account.
- 23-2-71. Entitlement to contribution; when equity has jurisdiction.
- 23-2-72. Apportionment of contract, rent, or hire.
- 23-2-73. Discharge of encumbrances affecting several interests.
- 23-2-74. Burden of distinguishing mingled property.
- 23-2-75. Offer to pay balance unnecessary.
- 23-2-76. Equitable setoff.

Article 5

Administration of Assets Generally

- 23-2-90. Legal and equitable assets defined; rules of distribution.
- 23-2-91. When equity will interfere with administration of estates.
- 23-2-92. Application for direction or construction of will.

- Sec.
23-2-93. Marshaling assets of decedent's estate.
23-2-94. Compelled election in marshaling assets.
23-2-95. Creditors' petitions.
23-2-96. When equitable assets may be reached by creditor.
23-2-97. Time limit for intervention in case disposing of assets; publication of order.
23-2-98. Application of joint and individual assets to debts.

Article 6

Exercise of Powers of Appointment, Sale, etc.

- 23-2-110. Equitable jurisdiction over powers.
23-2-111. Exercise of discretionary powers not compellable generally.
23-2-112. When faithful execution of power compellable.
23-2-113. When equity may relieve against collusive, illusory, mistaken, etc., executions.
23-2-114. Powers of sale — To be construed strictly; manner of sale; exercise by personal representative, transferee, etc.
23-2-115. Same — When private sale authorized.

- Sec.
23-2-116. Same — When exercisable by successor administrator, trustee, etc.
23-2-117. Release, relinquishment, or covenant as to exercise of power of appointment — Authorized.
23-2-118. Same — To be in writing; delivery or recordation.
23-2-119. Same — When fiduciaries or bona fide purchasers affected.
23-2-120. Application of Code Sections 23-2-117 through 23-2-119.

Article 7

Nonperformance of Contract

- 23-2-130. When specific performance decreed, generally.
23-2-131. When specific performance of parol contract for land decreed; sufficient part performance.
23-2-132. When voluntary agreement enforced.
23-2-133. Refusal of decree for inadequacy of price, unfairness, etc.
23-2-134. Vendor's ability to comply.
23-2-135. Damages when specific performance impossible.
23-2-136. Specific personalty; damages or delivery.

ARTICLE 1

GENERAL PROVISIONS

Cross references. — As to issuance of injunction to prevent nuisance, see § 41-2-4.

23-2-1. When equity will set aside judgment.

Equity will interfere to set aside a judgment of a court having jurisdiction only where a party had a good defense of which he was entirely ignorant or where he was prevented from presenting his defense by fraud or accident or the act of the adverse party, unmixed with fraud or negligence on his part. (Orig. Code 1863, § 3062; Code 1868, § 3074; Code 1873, § 3129; Code 1882, § 3129; Civil Code 1895, § 3988; Civil Code 1910, § 4585; Code 1933, § 37-220.)

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

NEGLIGENCE

FRAUD

MISTAKE OF FACT

DURESS

IGNORANCE GENERALLY

FAILURE TO PRESENT MERITORIOUS DEFENSE

General Consideration

Equity may set aside a void judgment, where diligence is proven. *Norris v. Pollard*, 75 Ga. 358 (1885).

Judgment cannot be attacked collaterally. *Fricks v. Miller*, 41 Ga. 274 (1870).

Even on ground that it was procured through accident or mistake. *Brooke v. Farmers & Merchants Bank*, 27 Ga. App. 250, 108 S.E. 135 (1921).

A court of equity will not lend its aid to a party to a contract founded upon an illegal or immoral consideration; if the contract is executed, it will be left to stand, and if it be executory, neither party can enforce it. *Fender v. Crosby*, 209 Ga. 896, 76 S.E.2d 769 (1953).

Equitable relief requires showing of inadequate remedy at law. — One invoking equitable relief against verdicts, as well as against judgments, should meet the usual requirement as to showing that his relief at law would be less adequate than his relief at equity. *Gentle v. Georgia Power Co.*, 179 Ga. 853, 177 S.E. 690 (1934).

Equitable interference after verdict at law prohibited except in cases of fraud, etc. — The general rule is, that courts will not interfere after verdict at law, except in cases of fraud, or surprise, or in extraordinary cases where manifest injustice would be done; nor where the party might have defended himself fully at law and neglected it. *Poole v. McEntire*, 209 Ga. 659, 75 S.E.2d 20 (1953).

A person is generally committed to the contents of an instrument which he signs, even though he did not have actual knowledge thereof, in the absence of fraud or some other circumstances relieving him of

the imputation of inexcusable indifference or neglect. *Bach v. Phillips*, 200 Ga. 308, 37 S.E.2d 407 (1946).

Absence of counsel, when caused by illness may be sufficient ground to set aside a judgment. *Clark v. Ramsay*, 138 Ga. 726, 75 S.E. 1128 (1912).

As may absence of a party. *McCall v. Miller*, 120 Ga. 262, 47 S.E. 920 (1904).

The general rule that an infant is bound by a judgment rendered in a suit in which he is represented by a next friend, to the same extent as though he were an adult, is subject to an exception in case of fraud, collusion, or like conduct on the part of the next friend, in which case the judgment may be set aside at the instance of the minor, even though it may be a consent judgment. *Nelson v. Estill*, 190 Ga. 235, 9 S.E.2d 73 (1940).

A decree adversely affecting the interests of minors, even though it be entered by consent of their father as next friend, may, if induced by fraud, duress, or the like, be set aside at their instance in a proper proceeding, and for that purpose they may sue by their mother as next friend. *Nelson v. Estill*, 190 Ga. 235, 9 S.E.2d 73 (1940).

Judgment taken in absence of party pursuant to agreed on continuance. — Where the parties agreed to continue the case, and for this reason a party fails to appear, he may have a judgment thus taken set aside. *Southern Ry. v. Planters Fertilizer Co.*, 134 Ga. 527, 68 S.E. 95 (1910).

Affidavit of illegality is not proper remedy to arrest execution and set aside judgment by default. *Tumlin v. O'Bryan Bros.*, 68 Ga. 65 (1881).

Nor judgment procured by fraud. *Ray v. Hixon*, 107 Ga. 768, 33 S.E. 692 (1899).

Cited in *Bryant v. Bush*, 165 Ga. 252, 140 S.E. 366 (1927); *Ellis v. Ellis*, 174 Ga. 559, 163 S.E. 155 (1932); *Walker v. Hall*, 176 Ga. 12, 166 S.E. 757 (1932); *Nolan v. Southland Loan & Inv. Co.*, 177 Ga. 59, 169 S.E. 370 (1933); *Hudson Ice & Coal Co. v. City of Covington*, 178 Ga. 6, 172 S.E. 56 (1933); *Jackson Dist. Co. v. Merck*, 178 Ga. 660, 173 S.E. 647 (1934); *Lovelace v. Lovelace*, 179 Ga. 822, 177 S.E. 685 (1934); *Gentle v. Georgia Power Co.*, 179 Ga. 853, 177 S.E. 690 (1934); *Stroup v. Imes*, 185 Ga. 422, 195 S.E. 411 (1938); *Haygood v. Haygood*, 190 Ga. 445, 9 S.E.2d 834 (1940); *Hadden v. Willingham Auto. Fin. Corp.*, 67 Ga. App. 444, 20 S.E.2d 436 (1942); *Bainbridge Farm Co. v. Bower*, 194 Ga. 304, 21 S.E.2d 224 (1942); *Rucker v. Uphaw*, 199 Ga. 529, 34 S.E.2d 602 (1945); *Hanleiter v. Spearman*, 200 Ga. 289, 36 S.E.2d 780 (1946); *Morris Plan Bank v. Simmons*, 201 Ga. 157, 39 S.E.2d 166 (1946); *Saliba v. Saliba*, 202 Ga. 279, 42 S.E.2d 748 (1947); *Hogg v. Hogg*, 206 Ga. 691, 58 S.E.2d 403 (1950); *Conway v. Gower*, 208 Ga. 348, 66 S.E.2d 740 (1951); *Poole v. McEntire*, 209 Ga. 659, 75 S.E.2d 20 (1953); *Johnson v. Johnson*, 210 Ga. 795, 82 S.E.2d 831 (1954); *Nuckolls v. Merritt*, 216 Ga. 35, 114 S.E.2d 427 (1960); *Hester v. Dixie Fin. Corp.*, 109 Ga. App. 204, 135 S.E.2d 504 (1964); *Tripp v. Conner*, 220 Ga. 2, 136 S.E.2d 744 (1964); *Tucker v. Tucker*, 221 Ga. 128, 143 S.E.2d 639 (1965); *Saturday v. Saturday*, 113 Ga. App. 251, 147 S.E.2d 798 (1966); *Echols v. Tower Credit Corp.*, 223 Ga. 307, 154 S.E.2d 617 (1967); *McSherry v. Israel*, 223 Ga. 472, 156 S.E.2d 33 (1967); *Kitchens v. Clay*, 224 Ga. 325, 161 S.E.2d 828 (1968); *Northern Freight Lines v. Fireman's Fund Ins. Cos.*, 121 Ga. App. 786, 175 S.E.2d 104 (1970); *Lewis v. Lewis*, 124 Ga. App. 579, 184 S.E.2d 672 (1971); *Aetna Fin. Co. v. Pair*, 141 Ga. App. 243, 233 S.E.2d 218 (1977); *Wilson v. Passmore*, 240 Ga. 716, 242 S.E.2d 124 (1978); *Cooper v. Mesh*, 247 Ga. 82, 274 S.E.2d 335 (1981).

Negligence

Before equity will interfere to grant relief against a judgment at law, three things must concur: ignorance of the defense sought to be set up at the time the judgment at law was rendered, without

negligence being imputable to the complainant, and a want of adequate relief at law. *Beddingfield v. Old Nat'l Bank & Trust Co.*, 175 Ga. 172, 165 S.E. 61 (1932).

There is no relief from a judgment that could have been prevented but for the negligence of the party. *Beddingfield v. Old Nat'l Bank & Trust Co.*, 175 Ga. 172, 165 S.E. 61 (1932).

Equity will not reward negligence. — Where a defendant in a pending lawsuit negligently fails to make his defense, equity will not intervene to grant him any relief from a judgment obtained against him in consequence of his negligence. *West v. Downer*, 218 Ga. 235, 127 S.E.2d 359 (1962); *Stratton v. Bingham*, 238 Ga. 287, 232 S.E.2d 560 (1977).

When a party moving to set aside a judgment, during the term it was rendered, has been legally served with the suit and does not show that an alleged fraud practiced on him by the defendant prevented him from making his defense and having his day in court, it is beyond a court's power to grant the motion. *Hirsch v. Collier*, 104 Ga. App. 271, 121 S.E.2d 318 (1961).

Equity will not intervene to set aside a judgment of a court of competent jurisdiction, which might have been prevented except for the negligence of the complaining party. *W.T. Rawleigh Co. v. Seagraves*, 178 Ga. 459, 173 S.E. 167 (1934).

If a party has a good defense at law, and from negligence fails to set it up at the proper time, he must take the consequences of his own laches; he cannot go into equity to be relieved from the consequences of such negligence. *Peacock v. Walker*, 213 Ga. 628, 100 S.E.2d 575 (1957).

The judgment probating a will in solemn form cannot be set aside on any ground which by due diligence could have been ascertained and pleaded as a defense against probate. *Smith v. Smith*, 225 Ga. 799, 171 S.E.2d 524 (1969).

As qualification of the rule controlling the setting aside of judgments or prerequisites to its exercise it must appear that it was not due to defendant's negligence that the fraud was perpetrated, and that due diligence would not have prevented the fraud. *Hirsch v. Collier*, 104 Ga. App. 271,

121 S.E.2d 318 (1961), later appeal, 106 Ga. App. 652, 127 S.E.2d 859 (1962).

To authorize setting aside a judgment after the term at which it was rendered, the actions of the adverse party that cause a party's failure to appear and defend must be of such character to show that reliance on them did not amount to laches or negligence. *Hirsch v. Collier*, 104 Ga. App. 271, 121 S.E.2d 318 (1961), later appeal, 106 Ga. App. 652, 127 S.E.2d 859 (1962).

The failure of a defendant to attend and defend a suit against him cannot be relieved in equity upon the ground that he was advised by his attorney that the case would not be tried until a later term, where it is merely shown that such advice was based upon an incorrect and unwarranted assumption that the remainder of the term would be devoted to the trial of criminal cases. In such a case the erroneous assumption on the part of the attorney would be imputable to the client, and would afford no equitable ground for excusing his absence. *W.T. Rawleigh Co. v. Seagraves*, 178 Ga. 459, 173 S.E. 167 (1934).

Where an administrator was sued upon an instrument alleged to have been executed by his intestate, and he did not know the instrument to be genuine, he should have exercised diligence to determine this fact before permitting judgment against him, and, where he knew or had reasonable cause to believe that the instrument would be introduced in evidence at the trial upon another defense which he had filed, when he would have a sufficient opportunity to discover the truth as to its genuineness, and he failed to avail himself of this opportunity and was absent from the trial only because of an unwarranted assumption by his attorney as to the time when the case would be tried, with the result that judgment was rendered against him, he cannot obtain the aid of a court of equity to set aside the judgment upon the ground that the instrument was a forgery and that he was ignorant of this defense at the time the judgment was rendered. In such case the failure to discover the defense before judgment cannot be accounted as an accident or misfortune, but is chargeable to the defendant as negligence, barring any claim for relief in equity. *W.T. Rawleigh Co. v.*

Seagraves, 178 Ga. 459, 173 S.E. 167 (1934).

Where a wife voluntarily signed an acknowledgment of service and waiver of process with respect to a suit for divorce that was later to be prepared and filed against her by her husband, and after having signed such acknowledgment and waiver, left the state and made no investigation whatever as to the contents of the suit, which, as filed sought not only a divorce but also custody of the minor child of the parties, with judgment rendered accordingly as to both matters in favor of the husband, the wife's petition in equity to set aside the judgment showed such negligence on the part of the wife in failing to acquaint herself with the contents of the suit as to bar her right to equitable relief sought, and the court did not err in dismissing the petition despite the wife's allegation that there was a breach of an agreement by the husband that he would not seek custody in the suit. *Bach v. Phillips*, 200 Ga. 308, 37 S.E.2d 407 (1946).

In order to set aside an award of the full workmen's compensation board (now Board of Workers' Compensation) which was entered pursuant to an agreement between the parties, because of fraud, accident or mistake, this fraud, accident or mistake is the same as is set forth in this section, and is not available where the person seeking to set aside the award has been guilty of fraud or negligence himself. Where an agreement signed by the claimant which is said to have been procured by fraud stated not only that the claimant did not suffer an injury which arose out of and in the course of her employment, but stated that she was not entitled to any compensation, such language being clear and understandable and it is not alleged that the claimant was prohibited from reading such agreement or that she did not read it, therefore, it must be concluded that the claimant was either negligent in failing to read such agreement or that she was negligent in signing it if some part of it was untrue and she had read it. *McCord v. Employers Liab. Assurance Corp.*, 96 Ga. App. 35, 99 S.E.2d 327 (1957).

Equity will not set aside judgment on the ground that a party and his attorney were prevented from attending the court by a

statement previously made to them by the justice of the peace that case would not be tried on date actually set, but on the next day absent fraud on the opposite party or his counsel and any meritorious defense against the recovery had by the verdict. *Dorsey v. Griffin*, 173 Ga. 802, 161 S.E. 601 (1931).

Negligent delay in seeking to set judgment aside. — Where the complainants negligently allowed three years to pass without seeking to set aside the judgment complained of at law, equity will not grant them any relief. *Field v. Jordan*, 124 Ga. 685, 52 S.E. 885 (1906).

Where failure to secure witnesses was due to negligence, equity will not grant relief. *McCaulis v. Duval*, 69 Ga. 744 (1882).

Equity will not, by injunction, restrain the enforcement of a judgment when the defendant had notice of such judgment within the period of limitations, and negligently failed to take any action to have such judgment vacated or set aside within the time provided by law. *Turner v. Avant*, 205 Ga. 426, 54 S.E.2d 269 (1949).

Fraud

Fraud generally. — The word fraud in this section may be construed to include duress. Duress is but a species of fraud where one is induced contrary to one's will from presenting a defense to a suit. *Frost v. Frost*, 235 Ga. 672, 221 S.E.2d 567 (1975).

Fraud in the procurement of a judgment to be set aside must have been actual and positive, done with knowledge, and not merely constructive fraud, committed in ignorance of the true facts. *Rivers v. Alsup*, 188 Ga. 75, 2 S.E.2d 632 (1939).

Deceitful practices in depriving or endeavoring to deprive another of his known right by means of some artful device or plan contrary to plain rules of common honesty constitute fraud. By this term is meant fraud perpetrated by some artifice or contrivance of the party or person benefited, whereby in the course of the trial, or in entering judgment, the injured party or the court has been imposed upon or betrayed into inattention or deceived. *Johnson v. Bogdis*, 205 Ga. 535, 54 S.E.2d 620 (1949), later appeal, 207 Ga. 650, 63 S.E.2d 658 (1951).

To determine whether equity will set aside award for fraud, this section, §§ 23-1-20 and 23-2-60 must be construed together. *Tinsley v. Maddox*, 176 Ga. 471, 168 S.E. 297 (1933).

The judicial power to set aside a judgment for fraud is recognized in this section. *Hirsch v. Collier*, 104 Ga. App. 271, 121 S.E.2d 318 (1961).

The power to set aside a judgment for fraud may be exercised by courts having equity jurisdiction when proper grounds are shown. *Hirsch v. Collier*, 104 Ga. App. 271, 121 S.E.2d 318 (1961).

A federal district court could set aside for fraud a judgment of the court of ordinary (now probate court) discharging a guardian. *Park v. Park*, 37 F. Supp. 185 (N.D. Ga.), later appeal, 123 F.2d 370 (5th Cir. 1941).

A proceeding to set aside for fraud a judgment of a court of ordinary (now probate court) discharging a guardian is authorized and could be maintained in the superior courts of the State of Georgia, and this without recourse to the court of ordinary which granted the judgment of discharge. *Park v. Park*, 37 F. Supp. 185 (N.D. Ga. 1941).

A party must be vigilant to detect fraud. One who has been negligent and inactive cannot obtain relief. *Hirsch v. Collier*, 104 Ga. App. 271, 121 S.E.2d 318 (1961), later appeal, 106 Ga. App. 652, 127 S.E.2d 859 (1962).

And fraud must be specifically alleged. — To set aside an award for fraud, it is not sufficient to state the fraud in general terms, but such facts of fraud must be so stated that the court may see the illegality. *Tinsley v. Maddox*, 176 Ga. 471, 168 S.E. 297 (1933).

When a party moving to set aside a judgment, during the term it was rendered, has been legally served with the suit and does not show that an alleged fraud practiced on him by the defendant prevented him from making his defense and having his day in court, it is beyond a court's power to grant the motion. *Hirsch v. Collier*, 104 Ga. App. 271, 121 S.E.2d 318 (1961).

While a court of equity in a proper case will set aside a judgment which is procured by fraud, such fraud must be one other than false and untrue testimony.

Hutchings v. Roquemore, 171 Ga. 359, 155 S.E. 675 (1930).

Fraud authorizing setting aside a judgment must come from the adverse party. Tinsley v. Maddox, 176 Ga. 471, 168 S.E. 297 (1933).

While a court of equity has authority to annul and set aside a judgment obtained by fraud, accident or mistake, it must be made to appear in an action therefor, where fraud is claimed, that the fraud was perpetrated by the adverse party, his counsel or agent. Pike v. Andrews, 210 Ga. 553, 81 S.E.2d 817 (1954).

Fraud that will authorize equity to set aside an award is fraud extrinsic or collateral to the matter tried by the first court, and not a fraud which was in issue in that suit; or it must be fraud or deception practiced on the unsuccessful party, by which he was prevented from exhibiting fully his case, and by which there has never been a real contest before court on the subject matter of the suit. Tinsley v. Maddox, 176 Ga. 471, 168 S.E. 297 (1933); Pike v. Andrews, 210 Ga. 553, 81 S.E.2d 817 (1954).

Before fraud will authorize a court of equity to vacate and set aside a judgment of a court having jurisdiction, it must appear that the fraud complained of was perpetrated by the prevailing party, his attorney or his agents. Poole v. McEntire, 209 Ga. 659, 75 S.E.2d 20 (1953); Pike v. Andrews, 210 Ga. 553, 81 S.E.2d 817 (1954).

The frauds for which the court may set aside a former judgment between the same parties do not include fraud in procuring a judgment by false testimony unless it is shown, among other things, that the witness has been convicted of perjury. Elliott v. Marshall, 182 Ga. 513, 185 S.E. 831 (1936).

A court of equity will not set aside a judgment, although obtained by willful and corrupt perjury, unless it appears that the perjurer has been convicted of such perjury, and unless it appears that a judgment could not have been rendered without the perjured testimony. Hutchings v. Roquemore, 171 Ga. 359, 155 S.E. 675 (1930).

Misrepresentation is one of the grounds on which equitable relief may be invoked in regard to judgments. Johnson v. Bogdis,

205 Ga. 535, 54 S.E.2d 620 (1949), later appeal, 207 Ga. 650, 63 S.E.2d 658 (1951).

When one party does give the other assurances upon which he can reasonably rely, that the suit will be dismissed or judgment will not be taken, and then procures a judgment taking advantage of the trust and confidence of the other party, the party misled, who is not himself negligent, has a ground to set aside the judgment. Hirsch v. Collier, 104 Ga. App. 271, 121 S.E.2d 318 (1961), later appeal, 106 Ga. App. 652, 127 S.E.2d 859 (1962).

A petition in equity seeking to set aside a judgment dismissing petitioner's suit at law on general demurrer (now motion to dismiss), by consent of one of petitioner's attorneys and counsel for defendant, on the ground of false representations made by defendant's counsel to induce petitioner's counsel to consent to the judgment, which failed to allege that petitioner's counsel consented to the judgment in violation of express instructions of which the defendant or her counsel had notice or knowledge, failed to set forth a cause of action for equitable relief, and it was not error to dismiss the petition on general demurrer (now motion to dismiss). Pike v. Andrews, 210 Ga. 553, 81 S.E.2d 817 (1954).

Effect of fraud perpetrated by third-party stranger. — One who has obtained a judgment at law and who is not chargeable with fraud, will not be interfered with by a court of equity for the mere reason that a stranger perpetrated a fraud which prevented the other party to the judgment from interposing a defense. Beddingfield v. Old Nat'l Bank & Trust Co., 175 Ga. 172, 165 S.E. 61 (1932).

One who has obtained a judgment at law according to the prescribed method, and who is not chargeable with any conduct which would amount to fraud or imposition upon the adverse party in relation to the judgment, will not be interfered with by a court of equity for the mere reason that a stranger perpetrated a fraud which prevented the other party to the judgment from interposing a defense. Pike v. Andrews, 210 Ga. 553, 81 S.E.2d 817 (1954).

The mere failure of a party to disclose to the court or to his adversary matters which would defeat his own claim or

defense is not such fraud as will justify or require a vacation of the judgment. *Buice v. T. & B. Bldrs., Inc.*, 219 Ga. 259, 132 S.E.2d 784 (1963).

Suppression of a material fact may constitute fraud such as will justify equity to set aside judgment obtained by it. *Capital Bank v. Rutherford*, 70 Ga. 57 (1883).

But it must be committed on complainant, or his agent. *Mahan v. Cavender*, 77 Ga. 118 (1886); *Lanier v. Nunally & Co.*, 128 Ga. 358, 57 S.E. 689 (1907).

Setting aside fraudulent registration of title to land. — In cases of fraud or forgery, the decree registering title in the name of an applicant for registration is not a bar to a proceeding by the true owner to set aside such registration, if he moves in seven years. *Rock Run Iron Co. v. Miller*, 156 Ga. 136, 118 S.E. 670 (1923).

Mistake of Fact

Allegations of mistake of fact constitute cause of action to set aside judgment. — Where, due to a mistake of fact unmixed with negligence, the condemnation proceeding for a public road was conducted throughout upon the theory that the road would be paved at approximately grade level, thus improving rather than damaging the remaining abutting property, and there was nothing to indicate that a fill of from 25 to 40 feet would be made in front of the remaining property which would damage it in the amount of approximately \$20,000.00, a petition in equity, alleging these facts and alleging that the mistake prevented the owners from proving this consequential damage, alleged a cause of action to set aside the award and the judgment of condemnation and to recover the full damages. *Whipple v. County of Houston*, 214 Ga. 532, 105 S.E.2d 898 (1958).

Acceptance of disqualified jurors, due to the fact that they failed to report their relationship to plaintiff, amounts to such a mistake as will authorize a court of equity to set aside the verdict rendered in the law court and order a new trial. *Gulf Ref. Co. v. Miller*, 151 Ga. 721, 108 S.E. 25 (1921).

Duress

Allegations of duress as acceptable basis to set judgment aside. — A party who

has been prevented by duress from defending a suit against him may be relieved from the judgment. *Hirsch v. Collier*, 104 Ga. App. 271, 121 S.E.2d 318 (1961).

Ignorance Generally

Ignorance insufficient as basis to set judgment aside. — A person who, through ignorance, allows a judgment to go against him, cannot afterwards have it set aside, even on the ground of fraud, if he himself has not exercised ordinary diligence in the premises. *Hoke v. Walraven*, 57 Ga. App. 106, 194 S.E. 610 (1937).

A court will not relieve against a judgment at law, unless the defendant in the judgment can show he had a good defense of which he was entirely ignorant while the suit at law was pending against him; or unless he was prevented from availing himself of his defense, by fraud, or accident, or the act of the adverse party, unmixed with negligence, or fault on his part. *Felker v. Johnson*, 189 Ga. 797, 7 S.E.2d 668 (1940).

A judgment will not be set aside in a court of equity on the ground that the defendant had a good defense of which he was entirely ignorant, unless it appears that his ignorance of such defense and his failure to assert it were unmixed with any fault or negligence on his part. *W.T. Rawleigh Co. v. Seagraves*, 178 Ga. 459, 173 S.E. 167 (1934).

Failure to Present Meritorious Defense

Presentation of meritorious defense required. — Where petition fails to allege that petitioner had filed a meritorious defense to the case in which judgment was rendered against him in the justice court, a court will not interfere to set aside such judgment. *Dorsey v. Griffin*, 173 Ga. 802, 161 S.E. 601 (1931).

Where no defense was offered, equity will not grant relief. *Cohen v. Meador*, 137 Ga. 551, 73 S.E. 749 (1912); *Garrett v. Thornton*, 157 Ga. 487, 121 S.E. 820 (1924).

Where defendant negligently fails to make his defense, equity will not grant any relief. *Cleckley v. Beall, Spears & Co.*, 37 Ga. 583 (1868); *Redwine v. McAfee*, 101 Ga. 701, 29 S.E. 428 (1897); *Graham v.*

Graham, 137 Ga. 668, 74 S.E. 426 (1912).

Two things are required to constitute a meritorious bill in equity to set aside a judgment rendered in a court having jurisdiction on account of accident, mistake or fraud: first, that the complainant had a good defense to the action at law; and secondly, that the failure to make that defense there was owing, not to any negligence or fault in the complainant, but to fault of the defendants or their attorney. *Russell v. Hoge*, 217 Ga. 814, 125 S.E.2d 648 (1962).

In equitable proceedings to set aside a judgment rendered in a court of law on account of accident, mistake, or fraud, the plaintiff is required to set out a meritorious defense to the action in which he seeks to set aside the judgment. This does not mean that, in a direct equitable proceeding to set aside a judgment of a court of ordinary or a court of law on the ground that such court or courts had no jurisdiction of the subject matter or of the person, and that said judgment is void, it is necessary to plead a meritorious defense. *Foster v. Foster*, 207 Ga. 519, 63 S.E.2d 318 (1951).

But mere failure to make a defense affords no grounds to set aside an award. *Tinsley v. Maddox*, 176 Ga. 471, 168 S.E. 297 (1933).

A judgment obtained against an executor cannot be set aside in equity by legatees on ground that there was a good

defense which executor failed to set up, unless it be also shown that there was accident, mistake, fraud, or corrupt complicity between executor and plaintiff. *Tinsley v. Maddox*, 176 Ga. 471, 168 S.E. 297 (1933).

To have a judgment set aside, a plaintiff must have a good defense of which he was entirely ignorant, or he must be prevented from making the defense because of fraud or accident, or the act of the adverse party, unmixed with fraud or negligence on his own part. The allegation that the plaintiff had no notice that he was being sued is not sufficient ground to set aside the judgment, the opposite party having complied with the law as to service. *Milam v. Busey*, 96 Ga. App. 88, 99 S.E.2d 325 (1957).

Failure to plead equitable defense in city court. — A judgment of a city court will not be set aside merely because the defendant failed to plead his equitable defenses thereto. *Gentle v. Atlas Sav. & Loan Ass'n*, 105 Ga. 406, 31 S.E. 544 (1898).

What plaintiff must prove. — Plaintiff must prove that he has a good defense. *Clark v. Ramsey*, 143 Ga. 729, 731, 85 S.E. 869 (1915).

Plaintiff must prove that he exercised due diligence, and the manner that his omission to assert his defense occurred. *Simmons v. Martin*, 53 Ga. 620 (1875).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Equity, §§ 224, 244, 251.

C.J.S. — 31 C.J.S., Equity, § 622 et seq.

ALR. — Right of infant to set aside consent judgment in action for personal injuries, 20 ALR 1249.

Nonresidence of one or both parties as affecting jurisdiction of court of suit or proceeding to annul divorce decree rendered in same state, 33 ALR 469.

Mental incompetency at the time of rendition of judgment in civil action as ground of attack upon it, 34 ALR 221; 140 ALR 1336.

Criterion of extrinsic fraud as distinguished from intrinsic fraud, as regards relief from judgment on ground of fraud, 88 ALR 1201.

Retention of jurisdiction in suit in equity to determine whole controversy, including amount of loss or damage, after setting aside an award or finding by arbitrators or appraisers, 112 ALR 9.

"Rightness" of judgment as open for consideration in suit in equity to complete or effectuate it, 139 ALR 1507.

Constructive service of process in action against nonresident to set aside judgment, 163 ALR 504.

Misinformation by judge or clerk of court as to status of case or time of trial or hearing as ground for relief from judgment, 164 ALR 537.

Power of successor judge taking office during termtime to vacate, etc., judgment entered by his predecessor, 11 ALR2d 1117.

Setting aside default judgment for failure of statutory agent on whom process was served to notify defendant, 20 ALR2d 1179.

Right of successful party to have judgment in his favor vacated or set aside on grounds of mistake, inadvertence, excusable neglect, or the like, 40 ALR2d 1127.

Appealability of order vacating, or refusing to vacate, approval of settlement of infant's tort claim, 77 ALR2d 801.

Consent as ground of vacating judgment, or granting new trial, in civil case, after expiration of term or time prescribed

by statute or rules of court, 3 ALR3d 1191.

Opening default or default judgment claimed to have been obtained because of attorney's mistake as to time or place of appearance, trial, or filing of necessary papers, 21 ALR3d 1255.

Liability insurer's right to open or set aside, or contest matters relating to merits of, judgment against insured, entered in action in which insurer did not appear or defend, 27 ALR3d 350.

Fraud in obtaining or maintaining default judgment as ground for vacating or setting aside in state courts, 78 ALR3d 150.

23-2-2. Setting aside sale or contract for inadequate consideration.

Great inadequacy of consideration, joined with great disparity of mental ability in contracting a bargain, may justify equity in setting aside a sale or other contract. (Orig. Code 1863, § 3110; Code 1868, § 3122; Code 1873, § 3179; Code 1882, § 3179; Civil Code 1895, § 4033; Civil Code 1910, § 4630; Code 1933, § 37-710.)

Cross references. — For further provisions regarding inadequacy of consideration, see § 13-3-46.

effect of contracts involving fraud or inadequate consideration, see 4 Ga. L. Rev. 469 (1970).

Law reviews. — For article discussing

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

APPLICABILITY OF SECTION

INADEQUATE CONSIDERATION AND MENTAL DISPARITY GENERALLY

1. IN GENERAL
2. FRAUD
3. INSANITY
4. WEAKNESS OF MIND
5. GRIEF
6. INTOXICATION

VALUATION OF CONSIDERATION

PLEADING AND PRACTICE

General Consideration

Cited in Thompson v. Thompson, 190 Ga. 264, 9 S.E.2d 80 (1940); Armour v. Lunsford, 192 Ga. 598, 15 S.E.2d 886 (1941); Livingston v. Barnett, 193 Ga. 640,

19 S.E.2d 385 (1942); Jones v. Hogans, 197 Ga. 404, 29 S.E.2d 568 (1944); Scott v. Gillis, 202 Ga. 220, 43 S.E.2d 95 (1947); Johnson v. Boyd, 202 Ga. 531, 43 S.E.2d 524 (1947); Pacific Nat'l Fire Ins. Co. v. Beavers, 87 Ga. App. 294, 73 S.E.2d 765

(1952); *Tillman v. Boyd*, 211 Ga. 918, 89 S.E.2d 479 (1955); *Sheppard v. Broome*, 214 Ga. 659, 107 S.E.2d 219 (1959); *Brogdon v. Purvis*, 220 Ga. 28, 136 S.E.2d 719 (1964); *Hobbs v. Clark*, 221 Ga. 558, 146 S.E.2d 271 (1965); *Norman v. Van Gerpen*, 221 Ga. 698, 146 S.E.2d 769 (1966); *Fender v. Fender*, 226 Ga. 129, 173 S.E.2d 211 (1970); *Titshaw v. Carnes*, 226 Ga. 430, 175 S.E.2d 541 (1970); *Fender v. Fender*, 228 Ga. 202, 184 S.E.2d 590 (1971); *Mullinax v. Shaw*, 143 Ga. App. 657, 239 S.E.2d 547 (1977).

Applicability of Section

Applicability of section. — Before it is applicable, this section requires great inadequacy of consideration joined with great disparity of mental ability. It follows, therefore, that both must exist. *Bailey v. Williams*, 215 Ga. 395, 110 S.E.2d 673 (1959).

Under the principle enunciated in this section, a deed may be set aside in equity, on proof of the two elements stated (in this section), without proof of anything else as to fraud. *Sutton v. McMillan*, 213 Ga. 90, 97 S.E.2d 139 (1957); *Titshaw v. Carnes*, 224 Ga. 57, 159 S.E.2d 420 (1968); *Jackson v. Rich*, 227 Ga. 149, 179 S.E.2d 256 (1971); *Harrell v. Wilson*, 223 Ga. 899, 213 S.E.2d 871 (1975).

Generally, this section is applied in those instances where great mental disparity is relied upon by one of the parties to the contract. *Moore v. Wells*, 212 Ga. 446, 93 S.E.2d 731 (1956).

The principle of this section is applicable whether the consideration be the payment of a sum of money or the rendition of services. *Fuller v. Stone*, 207 Ga. 355, 61 S.E.2d 467 (1950).

Inadequate Consideration and Mental Disparity Generally

1. In General

Want of consideration for a conveyance, coupled with mental weakness or old age and undue influence, will authorize equitable relief under this section. *Harden v. Weaver*, 184 Ga. 652, 192 S.E. 384 (1937).

“Great inadequacy of consideration, joined with great disparity of mental ability in contracting a bargain, may justify equity

in setting aside a sale or other contract.” Under that principle, a deed may be set aside in equity, on proof of the two elements stated, “without proof of anything else” as to fraud. A fortiori, the same rule would apply with at least equal force in case of such mental disparity and a total absence of consideration. *Stow v. Hargrove*, 203 Ga. 735, 48 S.E.2d 454 (1948).

2. Fraud

Fraud in the procurement renders contract void. — As between the original parties thereto, fraud in its procurement voids a contract, and this upon the theory that, the consent of the parties being necessary to the binding force of a contract, if one, apparently consenting by the execution of a written contract, can show that he did not in fact consent to its terms as therein expressed, but that his apparent consent was induced by false and fraudulent practices, by means of which he was overreached by the other party, and, without negligence upon his own part, really deceived as to the terms of the contract, he would be entitled to be relieved from its apparent obligations. *McKaig v. Hardy*, 196 Ga. 582, 27 S.E.2d 11 (1943).

Where the grantor of an “improvident or profuse” deed was not wholly incapable of entering into such a contract, but was possessed of little or no will power and was greatly under the influence of the nephew to whom the deed was executed, an inference of fraud could have been drawn by the jury, and, the evidence for the defendant grantee not being such as to rebut the inference as a matter of law, the court was authorized to charge the jury upon the subject of fraud. *Stanley v. Stanley*, 175 Ga. 139, 175 S.E. 496 (1934).

As against one who by fraud during the lifetime of deceased husband induced the latter to execute to him a deed to realty, equity will afford the widow, as personal representative, a remedy to cancel and set aside the deed and incidentally to preserve and apply rents issuing from such realty. *Ealy v. Tolbert*, 209 Ga. 575, 74 S.E.2d 867, later appeal, 210 Ga. 96, 78 S.E.2d 26 (1953).

3. Insanity

Where the maker is insane and the other party sane, there would be great mental disparity. The law however, presumes one to be sane. *Norwood v. Norwood*, 207 Ga. 148, 60 S.E.2d 449 (1950).

4. Weakness of Mind

Weakness of mind not amounting to imbecility insufficient mental incapacity to justify setting deed aside. — The law recognizes that there is “some disparity of mental ability between all persons who deal with each other,” and “weakness of mind not amounting to imbecility is not sufficient mental incapacity to justify setting a deed aside.” *Bailey v. Williams*, 215 Ga. 395, 110 S.E.2d 673 (1959).

5. Grief

Statement that person was “almost crazy with grief.” — In action for cancellation or rescission of deed, the mere statement that the plaintiff was “almost crazy with grief over the recent death of her son” shows neither a mental incapacity to execute the instrument nor a “great disparity of mental ability” between the parties, such as would authorize the interference of equity on account of a “great inadequacy” of consideration, even if a “great inadequacy” had been sufficiently alleged. *Hutchinson v. King*, 192 Ga. 402, 15 S.E.2d 523 (1941).

6. Intoxication

Where a party at the time of entering into a contract or executing an instrument is intoxicated to such a degree as to deprive him of his reason and to disqualify his mind to apprehend the nature of his act and its probable consequences, a court of equity may grant relief by rescission and cancellation. Equity will grant relief where the transfer of a valuable property has been fraudulently extorted, for a grossly

inadequate consideration, from a person while in such a state of intoxication as to render him incapable of transacting business. *McKaig v. Hardy*, 196 Ga. 582, 27 S.E.2d 11 (1943); *Ealy v. Tolbert*, 209 Ga. 575, 74 S.E.2d 867, later appeal, 210 Ga. 96, 78 S.E.2d 26 (1953).

Equity will grant relief where the transfer of a valuable property has been fraudulently extorted, for a grossly inadequate consideration, from a person while in such a state of intoxication as to render him incapable of transacting business. *Ealy v. Tolbert*, 209 Ga. 575, 74 S.E.2d 867, later appeal, 210 Ga. 96, 78 S.E.2d 26 (1953).

Valuation of Consideration

Questions of value are peculiarly for the determination of the jury where there is any data in evidence upon which they may legitimately exercise their “own knowledge or ideas.” *Brinson v. Hester*, 185 Ga. 761, 196 S.E. 412 (1938).

Pleading and Practice

Evidence of confidential relationships raises presumption of undue influence. — Where evidence is presented of a confidential relationship, the grantor being of weaker mentality and the grantee occupying the dominant position, an issue of fact is raised as to undue influence. *Fletcher v. Fletcher*, 242 Ga. 158, 249 S.E.2d 530 (1978).

Charge to jury. — Where the sole question was whether the transaction was an outright sale or a loan of money, and not a question of one party overreaching the other party the court did not err in not charging this section with respect to great inadequacy of consideration and great disparity of mental ability between the contracting parties. *Batts v. Bedingfield*, 204 Ga. 160, 48 S.E.2d 848 (1948).

RESEARCH REFERENCES

Am. Jur. 2d. — 25 Am. Jur. 2d, Duress and Undue Influence, § 35 et seq. 27 Am. Jur. 2d, Equity, § 20. 37 Am. Jur. 2d,

Fraud and Deceit, § 23.

C.J.S. — 37 C.J.S., Fraud, §§ 1, 60, 67.

23-2-3. Payment of lost bonds or notes.

In cases of lost bonds or negotiable securities, the court may decree that payment shall be made, provided indemnity is given against liability or loss resulting from such payment. (Orig. Code 1863, § 3046; Code 1868, § 3058; Code 1873, § 3113; Code 1882, § 3113; Civil Code 1895, § 3969; Civil Code 1910, § 4566; Code 1933, § 37-214.)

ARTICLE 2

ACCIDENT AND MISTAKE

Cross references. — As to pleading see § 9-11-9. As to effect of mistake on requirements in actions involving mistake, enforcement of contract, see § 13-5-4.

23-2-20. Which accidents relievable in equity.

An accident relievable in equity is an occurrence, not the result of negligence or misconduct of the party seeking relief in relation to a contract, as was not anticipated by the parties when the contract was entered into, which gives an undue advantage to one of them over another in a court of law. (Orig. Code 1863, § 3045; Code 1868, § 3057; Code 1873, § 3112; Code 1882, § 3112; Civil Code 1895, § 3968; Civil Code 1910, § 4565; Code 1933, § 37-201.)

JUDICIAL DECISIONS

An accident in its strict sense implies the absence of negligence for which no one would be liable. Richter v. Atlantic Co., 65 Ga. App. 605, 16 S.E.2d 259 (1941).

In its proper use the term accident excludes negligence; that is, an accident is an event which occurs without the fault, carelessness, or want of proper circumspection of the person affected, or which could not have been avoided by the use of that kind and degree of care necessary to the exigency and in the circumstances in which he was placed. Richter v.

Atlantic Co., 65 Ga. App. 605, 16 S.E.2d 259 (1941).

Cited in Williamson v. Floyd County Wildlife Ass'n, 215 Ga. 789, 113 S.E.2d 626 (1960); Tripp v. Conner, 220 Ga. 2, 136 S.E.2d 744 (1964); Finch v. McAloney, 222 Ga. 174, 149 S.E.2d 100 (1966); Gay v. American Oil Co., 115 Ga. App. 18, 153 S.E.2d 612 (1967); Humble Oil & Ref. Co. v. Mitchell, 230 Ga. 323, 197 S.E.2d 126 (1973); Kidd v. Kidd, 237 Ga. 232, 227 S.E.2d 259 (1976).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Equity, § 44.

C.J.S. — 30 C.J.S., Equity, § 44 et seq.

ALR. — Right to recover back in an action at law money paid upon an existing judgment, procured by or grounded on fraud or mistake, 9 ALR 400.

Insurance: death or injury resulting from insured's voluntary act as caused by accident or accidental means, 42 ALR 243; 45 ALR 1528; 71 ALR 1437; 111 ALR 628.

Mistake, accident, inadvertence, etc., as ground for relief from termination or forfeiture of oil or gas lease for failure to complete well, commence drilling, or pay rental, strictly on time, 5 ALR2d 993.

Rupture of blood vessel following exertion or exercise as within terms of accident provision of insurance policy, 35 ALR2d 1105.

Power of equity court to reach or to sequester, for seizure and sale, beneficial equitable interests in corporate stock shares, 42 ALR2d 920.

Repeated absorption of poisonous substance as "accident" within coverage clause of comprehensive general liability policy, 49 ALR2d 1263.

Accident insurance: death or injury intentionally inflicted by another as due to accident or accidental means, 49 ALR3d 673.

23-2-21. What mistakes relievable in equity; power to relieve to be exercised cautiously.

(a) A mistake relievable in equity is some unintentional act, omission, or error arising from ignorance, surprise, imposition, or misplaced confidence.

(b) Mistakes may be either of law or of fact.

(c) The power to relieve mistakes shall be exercised with caution; to justify it, the evidence shall be clear, unequivocal, and decisive as to the mistake. (Orig. Code 1863, §§ 3050, 3053; Code 1868, §§ 3062, 3065; Code 1873, §§ 3117, 3120; Code 1882, §§ 3117, 3120; Civil Code 1895, §§ 3973, 3977; Civil Code 1910, §§ 4570, 4574; Code 1933, §§ 37-202, 37-203.)

Cross references. — As to form of complaint for money paid by mistake, see § 9-11-107.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
MUTUAL MISTAKE
IGNORANCE OF FACT
REASONABLE DILIGENCE
PLEADING AND PRACTICE

General Consideration

A mistake, either of law or fact, is cognizable in equity and affords a remedy therein by reformation of the instrument so as to make it express the true intention of the parties, on a proper cause being

made; but such a jurisdiction will always be cautiously exercised, and to justify it the evidence must be clear, unequivocal, and decisive. *Yablon v. Metropolitan Life Ins. Co.*, 200 Ga. 693, 38 S.E.2d 534 (1946); *Prince v. Friedman*, 202 Ga. 136, 42 S.E.2d 434 (1947).

Reformation as applied to a contract is remedy cognizable in equity for the purpose of correcting an instrument so as to make it express the true intention of the parties, where from some cause, such as fraud, accident, or mistake it does not express such intention. The remedy is not available for the purpose of making a new and different contract for the parties, but is confined to establishment of the actual agreement. *Deck v. Shields*, 195 Ga. 697, 25 S.E.2d 514 (1943).

Mistake defined. — Mistake, within the meaning of equity, is an erroneous mental condition, conception, or conviction, induced by ignorance, misapprehension, or misunderstanding of the truth, but without negligence and resulting in some act or omission done or suffered erroneously by one or both of the parties to a transaction, but without its erroneous character being intended or known at the time. *Callan Court Co. v. Citizens & S. Nat'l Bank*, 184 Ga. 87, 190 S.E. 831 (1937); *Whipple v. County of Houston*, 214 Ga. 532, 105 S.E.2d 898 (1958).

Mistake is internal; it is a mental condition, a conception, a conviction of the understanding; erroneous indeed, but nonetheless a conviction which influences the will and leads to some outward physical manifestation. Its operation is ordinarily, though not always, affirmative the doing of some act which would not have been done in the absence of the particular conception or conviction which influenced the free action of the will. Its essential requisite is ignorance. *Callan Court Co. v. Citizens & S. Nat'l Bank*, 184 Ga. 87, 190 S.E. 831 (1937).

The essential element of a mistake is a mental condition or conception or conviction of the understanding. This mental condition may be either a passive state or an active conviction. When merely passive, it may consist of an unconsciousness, an ignorance, or a forgetfulness; when active, it must be a belief. In the first of these two conditions, the unconsciousness, ignorance, or forgetfulness may be either of a fact which is present and now existing, or of a fact which is past and has existed; they must always concern a fact material to the transaction. In the second condition, the belief may be either that a certain matter or

thing exists at the present time which really does not exist; or that certain matter or thing existed at some time which did not really exist. All possible forms of mistake of fact are embraced within this description; and all particular errors which fall under any of these conditions are mistakes of fact which furnish an occasion for equitable relief. *Callan Court Co. v. Citizens & S. Nat'l Bank*, 184 Ga. 87, 190 S.E. 831 (1937).

Mistake of fact is a mistake not caused by the neglect of a legal duty on the part of the person making the mistake, and consisting in, an unconscious ignorance or forgetfulness of a fact, past or present, material to the contract; or belief in the present existence of a thing material to the contract which does not exist, or in the past existence of such a thing which has not existed. *Callan Court Co. v. Citizens & S. Nat'l Bank*, 184 Ga. 87, 190 S.E. 831 (1937).

Mistake is distinguished from fraud, fraudulent representations, or fraudulent concealments, by the absence of knowledge and intention, which in legal fraud are actually present, and in constructive fraud are theoretically present, as necessary elements. It is also distinguished from that inattention or absence of thought which are inherent in negligence. The erroneous conception or conviction of the understanding which constitutes the equitable notion of mistake has nothing in common with negligence; equity will not relieve a person from his erroneous acts or omissions resulting from his own negligence. *Callan Court Co. v. Citizens & S. Nat'l Bank*, 184 Ga. 87, 190 S.E. 831 (1937).

If equity can reform a contract for sale of land, it can also reform the deed to the land. *West Lumber Co. v. Moore*, 179 Ga. 302, 175 S.E. 642 (1935).

Cited in *Sapp v. Ritch*, 169 Ga. 33, 149 S.E. 636 (1929); *West Lumber Co. v. Moore*, 179 Ga. 302, 175 S.E. 642 (1935); *Bender v. Randall Bros.*, 189 Ga. 197, 5 S.E.2d 889 (1939); *Gibbs v. H.T. Henning Co.*, 189 Ga. 675, 7 S.E.2d 238 (1940); *Sawyer Coal & Ice Co. v. Kinnett-Odom Co.*, 192 Ga. 166, 14 S.E.2d 879 (1941); *Deck v. Shields*, 195 Ga. 697, 25 S.E.2d 514 (1943); *Lane v. Howard*, 201 Ga. 616, 40

S.E.2d 537 (1946); McCullough v. Kirby, 204 Ga. 738, 51 S.E.2d 812 (1949); Hood v. Connell, 204 Ga. 782, 51 S.E.2d 853 (1949); Minor v. Fincher, 206 Ga. 721, 58 S.E.2d 389 (1950); Scurry v. Cook, 206 Ga. 876, 59 S.E.2d 371 (1950); Altman v. Strouse, 210 Ga. 282, 79 S.E.2d 801 (1954); Miller v. Shaw, 212 Ga. 302, 92 S.E.2d 98 (1956); Whipple v. County of Houston, 214 Ga. 532, 105 S.E.2d 898 (1958); White County v. Wooten, 219 Ga. 236, 132 S.E.2d 653 (1963); Tripp v. Conner, 220 Ga. 2, 136 S.E.2d 744 (1964); Farmers Whse. of Pelham, Inc. v. Collins, 220 Ga. 141, 137 S.E.2d 619 (1964); Finch v. McAloney, 222 Ga. 174, 149 S.E.2d 100 (1966); Bonner v. Cotton, 223 Ga. 843, 159 S.E.2d 61 (1968); Hartford Accident & Indem. Co. v. Walka Mt. Camp No. 565, Woodmen of the World, Inc., 224 Ga. 194, 160 S.E.2d 833 (1968); William H. Benton Co. v. Irvindale Dairies, Inc., 224 Ga. 780, 164 S.E.2d 819 (1968); B.L. Ivey Constr. Co. v. Pilot Fire & Cas. Co., 295 F. Supp. 840 (N.D. Ga. 1968); Lewis v. Williford, 235 Ga. 558, 221 S.E.2d 14 (1975); Martin v. Heard, 239 Ga. 816, 238 S.E.2d 899 (1977).

Mutual Mistake

Equity will not reform a contract on the ground of mistake, unless it be a mutual one or unless there be a mistake on one side and fraud on the other. Rawson v. Brosnan, 187 Ga. 624, 1 S.E.2d 423 (1939); Yablon v. Metropolitan Life Ins. Co., 200 Ga. 693, 38 S.E.2d 534 (1946).

Equity will not decree the reformation of an instrument because of mistake of one of the parties alone unmixed with any fraud or knowledge on the part of the other equivalent to mutual mistake. For a mistake to be relievable in equity by reformation, it must be mutual, or else mistake on the part of one to the contract and fraud on the part of the other. Yablon v. Metropolitan Life Ins. Co., 200 Ga. 693, 38 S.E.2d 534 (1946); Prince v. Friedman, 202 Ga. 136, 42 S.E.2d 434 (1947).

A court of equity will reform a contract of sale when, from mutual mistake or mistake common to both parties, an instrument does not express the true agreement of the parties. Equity will also reform an instrument where there is mistake on one side, and fraud or inequitable

conduct on the other. Prince v. Friedman, 202 Ga. 136, 42 S.E.2d 434 (1947).

To enable a court to reform an agreement evidenced by writing on the ground of mistake, it must affirmatively appear that the mistake was common to both parties, and that the writing, as executed, expresses the contract as understood by both parties. Prince v. Friedman, 202 Ga. 136, 42 S.E.2d 434 (1947).

If a writing has been executed with a view of obtaining a particular object, and by mistake it has been so drawn as not to have the contemplated operations at law, chancery (now equity) will reform the instrument, so that it will fulfill the intention of the parties. Agreements, whether executed or executory, within or without the statute of frauds, whether for the conveyance of real or personal property, will be reformed by courts of equity, on the ground of mistake. Head v. Stephens, 215 Ga. 184, 109 S.E.2d 772 (1959), later appeal, 218 Ga. 191, 126 S.E.2d 623 (1962).

"An honest mistake of the law as to the effect of an instrument on the part of both contracting parties, when such mistake operates as a gross injustice to one, and gives an unconscientious advantage to the other, may be relieved in equity." Fidelity & Deposit Co. v. State Hwy. Dep't, 174 Ga. 443, 163 S.E. 174 (1932).

The rule is well settled that a simple mistake by a party as to the legal effect of an agreement which he executes, or as to the legal result of an act which he performs, is no ground for either defensive or affirmative relief. Callan Court Co. v. Citizens & S. Nat'l Bank, 184 Ga. 87, 190 S.E. 831 (1937).

Where a defendant has been served and a judgment is rendered against him by fraud, accident, or mistake, without fault or negligence on his part, a petition in equity to set aside the judgment will lie. Dollar v. Fred W. Amend Co., 184 Ga. 432, 191 Ga. 696 (1937).

Where, due to a mistake of fact unmixed with negligence, the condemnation proceeding for a public road was conducted throughout upon the theory that the road would be paved at approximately grade level, thus improving rather than damaging the remaining abutting property, and

there was nothing to indicate that a fill of from 25 to 40 feet would be made in front of the remaining property which would damage it in the amount of approximately \$20,000.00, a petition in equity, alleging these facts and alleging that the mistake prevented the owners from proving this consequential damage, alleged a cause of action to set aside the award and the judgment of condemnation and to recover the full damages. *Whipple v. County of Houston*, 214 Ga. 532, 105 S.E.2d 898 (1958).

Mistake of draftsman acting by direction of only one party as unilateral mistake. — In some jurisdictions it is held that the mistake of a draftsman or scrivener, acting by direction of only one of the parties, is a unilateral mistake, and is one which will not warrant reformation. Such appears to be the rule in this state. *Yablon v. Metropolitan Life Ins. Co.*, 200 Ga. 693, 38 S.E.2d 534 (1946).

Plea of the defendant to action on note given by him to former partner on dissolution of partnership, alleging mutual mistake in calculating the earnings of the business, failed to allege a mistake as contemplated by law, and the court did not err in dismissing the plea and in directing the verdict for the plaintiff. *Hargrove v. Bledsoe*, 78 Ga. App. 107, 50 S.E.2d 223 (1948).

Ignorance of Fact

Ignorance of fact will not justify the rescission of a contract. *Prince v. Friedman*, 202 Ga. 136, 42 S.E.2d 434 (1947).

Reasonable Diligence

Reasonable diligence of complainant required. — Equity will relieve against mutual mistake, but only at the instance of a complainant who moves with reasonable diligence. What is a reasonable time must necessarily depend upon the peculiar facts and environments of the particular case. *Parker v. Fisher*, 207 Ga. 3, 59 S.E.2d 715 (1950).

Equity will grant no relief to one who by the exercise of ordinary diligence, could have prevented the injury complained of. *Prince v. Friedman*, 202 Ga. 136, 42 S.E.2d 434 (1947).

Failure of insured to read policy insufficient as proof of lack of ordinary diligence. — A mere failure of an insured to read his policy of insurance does not amount to such laches as will debar him from having such policy reformed for mistake therein. A policy of insurance is issued by the insurer and signed by him or his agent. It is not contemplated that the insured shall sign it. In the insurer's promise to deliver an accurate policy, according to his oral agreement with the insured, the insured has a just expectation that there will be no designed variance. *Georgia Farm Bureau Mut. Ins. Co. v. Wall*, 242 Ga. 176, 249 S.E.2d 588 (1978).

Pleading and Practice

Grounds of mistake must be fully alleged. — When a defendant, in a court of law, seeks to avoid his contract on the ground of mistake, he must, by his pleadings, allege the grounds of the mistake, as fully as he is required to do in a court of equity to entitle him to relief. *Hargrove v. Bledsoe*, 78 Ga. App. 107, 50 S.E.2d 223 (1948).

The rules of pleading in this state require that allegations of mistake should be set forth with considerable definiteness and certainty, and that such general allegations as that certain matters were left out of or included in the contract as written "by mutual mistake of the parties" are not sufficient. *Wheeler v. Poole*, 204 Ga. 477, 50 S.E.2d 326 (1948).

And evidence of mistake must be clear, unequivocal and decisive. — To authorize a verdict reforming a deed upon the ground of mutual mistake, the evidence, like the petition, should at least by inference show the particular mistake and illustrate how it occurred; and the evidence must be clear, unequivocal, and decisive as to the mistake. *Helton v. Shellnut*, 186 Ga. 185, 197 S.E. 287 (1938).

Where the court did charge in language identical to that of this section, it is not subject to the criticism that it erred in its charge to the jury that they must decide the question of mistake by a preponderance of the testimony, whereas the law provides that the evidence must be clear, unequivocal, and decisive as to the mistake. *Fidelity & Deposit Co. v. State Hwy. Dep't*, 174 Ga. 443, 163 S.E. 174 (1932).

It was error for the court to instruct the jury that the party seeking reformation of the description in a deed could establish his right thereto by a preponderance of the evidence only. *Carroll v. Craig*, 214 Ga. 257, 104 S.E.2d 215 (1958).

Parol evidence. — Before decreeing reformation, a court requires that the parol evidence of a mistake and of an alleged modification of a contract must be most clear and convincing. *Georgia Farm Bureau Mut. Ins. Co. v. Wall*, 242 Ga. 176, 249 S.E.2d 588 (1978).

In a suit for reformation of contract based upon alleged mutual mistake, the parol evidence rule does not bar introduction of testimony as to the oral agreement reached by the parties which the writing was intended to reflect. *Georgia Farm Bureau Mut. Ins. Co. v. Wall*, 242 Ga. 176, 249 S.E.2d 588 (1978).

Where petition alleges that parties to a deed orally agreed that the consideration was to be \$850.00 cash for the plaintiff's equity and that the defendants were to assume and pay certain loans on the property, and that, due to a mutual mistake of

law as to the effect of a recital of a nominal consideration in a deed, the deed fails to state the true consideration agreed upon by the parties, the fact that the agreement is not in writing will not bar a recovery, since what is sought to be enforced is not an oral agreement barred by the statute of frauds, but to reduce to writing the true agreement between the parties to prevent an unconscionable advantage to one of the parties to a contract. *Head v. Stephens*, 215 Ga. 184, 109 S.E.2d 772 (1959), later appeal, 218 Ga. 191, 126 S.E.2d 623 (1962).

A docketing error made in the clerk's office amounts to an accident or mistake relievable in equity so far as the defendant is concerned, provided the failure to answer is attributable thereto, without fault or negligence on its part. *Dollar v. Fred W. Amend Co.*, 184 Ga. 432, 191 S.E. 696 (1937).

A mere mistake in judgment or opinion as to the value of property does not authorize interference by the courts. *Hargrove v. Bledsoe*, 78 Ga. App. 107, 50 S.E.2d 223 (1948).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Equity, §§ 29, 30.

C.J.S. — 30 C.J.S., Equity, § 44 et seq.

ALR. — Relief from contract of sale because of mistake as to amount of commodity which it calls for, 31 ALR 384.

Recovery back of public money paid by mistake, 63 ALR 1346.

Misrepresentation or mistake as to whether corporate stock is assessable as one of law or of fact, 65 ALR 1256.

Mistake as to law of another state or country as one of law or of fact, 73 ALR 1260.

Good faith in receiving payment made under mistake of fact as affecting its recovery, 87 ALR 649.

Conscious ignorance of fact, as distinguished from mistake of fact, as ground for reformation of contract, 137 ALR 908.

Mistake by one party to contract as to identity of other party who acted in good faith, 147 ALR 1171.

Right to refund or recovery back of taxes paid on property not owned by taxpayer, 165 ALR 879.

What constitutes change of position by payee so as to preclude recovery of payment made under mistake, 40 ALR2d 997.

Compensation for improvements made or placed on premises of another by mistake, 57 ALR2d 263.

Right of tenant to recover rentals previously paid to one mistakenly believed to be owner of property, 57 ALR2d 350.

Recovery back by employer of compensation paid to employee as result of mistake or the employee's fraud, 88 ALR2d 1437.

Reformation of property insurance policy to correctly identify the person or interest insured, 25 ALR2d 580.

What constitutes mistake in the identity of one of the parties to warrant annulment of marriage, 50 ALR3d 1295.

23-2-22. Mistake of law in instrument — By contracting parties.

An honest mistake of the law as to the effect of an instrument on the part of both contracting parties, when the mistake operates as a gross injustice to one and gives an unconscionable advantage to the other, may be relieved in equity. (Orig. Code 1863, § 3055; Code 1868, § 3067; Code 1873, § 3122; Code 1882, § 3122; Civil Code 1895, § 3979; Civil Code 1910, § 4576; Code 1933, § 37-204.)

JUDICIAL DECISIONS

Equity will relieve against mutual mistake, but only at the instance of a complainant who moves with reasonable diligence. What is a reasonable time must necessarily depend upon the peculiar facts and environments of the particular case. *Parker v. Fisher*, 207 Ga. 3, 59 S.E.2d 715 (1950).

Cited in *State Highway Dep't v. Fidelity & Deposit Co.*, 168 Ga. 288, 147 S.E. 522

(1929); *Sapp v. Ritch*, 169 Ga. 33, 149 S.E. 636 (1929); *Gibbs v. H.T. Henning Co.*, 189 Ga. 675, 7 S.E.2d 238 (1940); *Hutchinson v. King*, 192 Ga. 402, 15 S.E.2d 523 (1941); *Miller v. Shaw*, 212 Ga. 302, 92 S.E.2d 98 (1956); *Stein Steel & Supply Co. v. K. & L. Enterprises, Inc.*, 97 Ga. App. 71, 102 S.E.2d 99 (1958); *Seaboard Constr. Co. v. Clifton*, 121 Ga. App. 247, 173 S.E.2d 436 (1970).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Equity, §§ 36-38, 40-42.

ALR. — Mistake in lease as ground for relief, 26 ALR 472.

Right to reformation of conveyance as depending upon consideration, 69 ALR 423; 128 ALR 1299.

Mistake as to law of another state or country as one of law or of fact, 73 ALR 1260.

Avoidance on ground of fraud, mistake, duress, or mental incompetency of otherwise validly effected change of beneficiaries of insurance policies, 105 ALR 950.

Misrepresentation as to matters of foreign law as actionable, 24 ALR2d 1039.

Negligence in executing contract as affecting right to have it reformed, 81 ALR2d 7.

23-2-23. Same — By agent.

A mistake of law by the draftsman or other agent, by which the contract, as executed, does not fulfill or violates the manifest intention of the parties to the agreement, may be relieved in equity. (Orig. Code 1863, § 3056; Code 1868, § 3068; Code 1873, § 3123; Code 1882, § 3123; Civil Code 1895, § 3980; Civil Code 1910, § 4577; Code 1933, § 37-205.)

JUDICIAL DECISIONS

Equity will relieve against mutual mistake, but only at the instance of a complainant who moves with reasonable diligence. What is a reasonable time must

necessarily depend upon the peculiar facts and environments of the particular case. *Parker v. Fisher*, 207 Ga. 3, 59 S.E.2d 715 (1950).

Allegations of inadequate description by draftsman states case for reformation.

— Where a petition is brought by assignee for reformation of a written lease and option agreement, alleging a valuable consideration, and that permanent improvements had been made on the property involved, and that an alleged inadequate description of the property had been made by mistake of the draftsman, it having been the intention of the parties that the description contended for be inserted in the agreement, and further alleging that unless so reformed an unconscionable advantage would be acquired by the defendant, such allegations state a case for reformation of the lease and option

agreement. *Martin v. Oakhurst Dev. Corp.*, 197 Ga. 288, 29 S.E.2d 179 (1944).

A petition for reformation of a written contract will lie where by mistake of the scrivener and by oversight of the parties, the writing does not embody or fully express the real contract of the parties. *McLoon v. McLoon*, 220 Ga. 18, 136 S.E.2d 740 (1964).

Cited in *Bender v. Randall Bros.*, 189 Ga. 197, 5 S.E.2d 889 (1939); *Gibbs v. H.T. Henning Co.*, 189 Ga. 675, 7 S.E.2d 238 (1940); *Redmond v. Sinclair Ref. Co.*, 204 Ga. 699, 51 S.E.2d 409 (1949); *Sheldon v. Hargrope*, 213 Ga. 672, 100 S.E.2d 898 (1957); *Flagg v. Hedrick*, 215 Ga. 16, 108 S.E.2d 703 (1959); *Robinson v. Wright*, 217 Ga. 199, 121 S.E.2d 640 (1961); *Seaboard Constr. Co. v. Clifton*, 121 Ga. App. 247, 173 S.E.2d 436 (1970).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Equity, §§ 35, 36.

C.J.S. — 30 C.J.S., Equity, § 44 et seq.

ALR. — Relief in equity from mistake of law, 75 ALR 896.

23-2-24. When mistake of fact relieved.

In all cases of a mistake of fact material to the contract or other matter affected by it, if the complaining party applies within a reasonable time, equity will grant relief. (Orig. Code 1863, § 3058; Code 1868, § 3070; Code 1873, § 3125; Code 1882, § 3125; Civil Code 1895, § 3983; Civil Code 1910, § 4580; Code 1933, § 37-206.)

JUDICIAL DECISIONS

Relief of mistake of fact generally. —

Although equity will not reform a written contract because of mistake as to the contents of the writing on the part of the complaining party, who is able to read but fails to do so, where no sufficient excuse appears as to why such party did not read the contract, such principle has not been extended to cases in which it is sought to reform written instruments on the ground of mutual mistake of fact. *Sheldon v. Hargrope*, 213 Ga. 672, 100 S.E.2d 898 (1957).

Even where money is paid under a mistake of fact or in ignorance of facts, it cannot be recovered, unless the circumstances are such that the party receiving it ought not, in equity and good conscience, to be allowed to retain it. The expression, "in equity and good conscience," refers only to the acts and intentions of the person receiving the money as affecting the other party to the transaction. If he has acted in good faith and in good conscience with the person paying the money, he is entitled to retain it, even if his actions and intentions

may not have been in good faith and in good conscience as regards other persons not connected with the transaction. *Bryant v. Guaranty Life Ins. Co.*, 40 Ga. App. 573, 150 S.E. 596 (1929).

Where, due to a mistake of fact unmixed with negligence, the condemnation proceeding for a public road was conducted throughout upon the theory that the road would be paved at approximately grade level, thus improving rather than damaging the remaining abutting property, and there was nothing to indicate that a fill of from 25 to 40 feet would be made in front of the remaining property which would damage it in the amount of approximately \$20,000.00, a petition in equity, alleging these facts and alleging that the mistake prevented the owners from proving this consequential damage, alleged a cause of action to set aside the award and the judgment of condemnation and to recover the full damages. *Whipple v. County of Houston*, 214 Ga. 532, 105 S.E.2d 898 (1958).

A contractor who has bid for the excavation of highway sites on a basis of "unclassified material" may not, under the guise of mistake of fact, seek additional compensation in an action at law because the material excavated contained a higher percentage of rock than it expected, even though its only information at the time of the bid was results of test borings made available to it by the highway department (now Department of Transportation), where it was specifically stipulated that the data were not guaranteed and did not bind the department; where the department furnished all information which it had available, made no attempt to conceal actual conditions, and stipulated the provisional character of its tests, where the contractor had equal opportunity with the department to conduct its own investigation, and where the parties with knowledge of these facts elected to contract on a basis of material moved rather than to contract on a basis of the percentage of dirt and rock after removal. *State Hwy. Dep't v. MacDougald Constr. Co.*, 102 Ga. App. 254, 115 S.E.2d 863 (1960).

Where a deed fixes the northern bound-

ary of a tract of land as a certain public road, the legal effect of such description, in the absence of a contrary intention being manifested in the instrument, is that the road open and actually in use by the public is the road intended by the parties, rather than the site of an old road, and the language, being unambiguous, cannot be aided by extrinsic evidence to extend the boundary to the old-road site, the sole remedy for such purpose being reformation of the deed. *Miller v. Rackley*, 199 Ga. 370, 34 S.E.2d 438 (1945).

A defense of mistake of fact is not available to one who relies on a unilateral mistake, especially where the mistake, if there is one, is caused by the party's own negligence. *Hyman v. Horwitz*, 148 Ga. App. 647, 252 S.E.2d 74 (1979).

Evidence of mistake must be clear, etc. — A mistake, either of law or fact, is cognizable in equity and affords a remedy therein by reformation of the instrument so as to make it express the true intention of the parties, on a proper cause being made; but such a jurisdiction will always be cautiously exercised, and to justify it the evidence must be clear, unequivocal, and decisive. *Yablon v. Metropolitan Life Ins. Co.*, 200 Ga. 693, 38 S.E.2d 534 (1946).

Use of extrinsic evidence. — If the description in a deed is unambiguous, extrinsic evidence cannot be resorted to, except for the purpose of reforming the deed so as to make it express the real intention of the parties and correct a mutual mistake of fact. *Miller v. Rackley*, 199 Ga. 370, 34 S.E.2d 438 (1945).

Cited in *Paris v. Treadaway*, 173 Ga. 639, 160 S.E. 797 (1931); *Young v. Hirsch*, 187 Ga. 1, 199 S.E. 179 (1938); *Bender v. Randall Bros.*, 189 Ga. 197, 5 S.E.2d 889 (1939); *Orient Ins. Co. v. Dunlap*, 193 Ga. 241, 17 S.E.2d 703 (1941); *City of Jefferson v. Trustees of Martin Inst.*, 199 Ga. 71, 33 S.E.2d 354 (1945); *Hargrove v. Bledsoe*, 78 Ga. App. 107, 50 S.E.2d 223 (1948); *Peerless Cas. Co. v. Housing Auth.*, 228 F.2d 376 (5th Cir. 1955); *Robinson v. Wright*, 217 Ga. 199, 121 S.E.2d 640 (1961); *Eastside Carpet Mills, Inc. v. Dodd*, 144 Ga. App. 580, 241 S.E.2d 466 (1978).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Equity, §§ 31, 32.

C.J.S. — 30 C.J.S., Equity, § 44 et seq.

ALR. — Ignorance of, or mistake as to, terms of existing mortgage upon the property as ground for relief from a contract for the purchase of real property, 26 ALR 528.

Relief from contract of sale because of mistake as to amount of commodity which it calls for, 31 ALR 384.

Good faith in receiving payment made under mistake of fact as affecting its recovery, 87 ALR 649.

Property rights in respect of building, fence, or other structure placed upon another's land through mistake as to boundary or location, 130 ALR 1034.

Conscious ignorance of fact, as distinguished from mistake of fact, as ground for reformation of contract, 137 ALR 908.

Reformation on ground of mutual mistake regarding character or extent of estate or title imported by language used in instrument, 141 ALR 826.

Mistake as to existence, practicability of

removal, or amount of minerals as ground for relief from mineral lease, 163 ALR 878.

Measure and items of recovery for improvements mistakenly placed or made on land of another, 24 ALR2d 11.

Recovery back by employer of compensation paid to employee as result of mistake or the employee's fraud, 88 ALR2d 1437.

Reformation of property insurance policy to correctly identify the person or interest insured, 25 ALR3d 580.

Vendor and purchaser: mutual mistake as to physical condition of realty as ground for rescission, 50 ALR3d 1188.

What constitutes mistake in the identity of one of the parties to warrant annulment of marriage, 50 ALR3d 1295.

When statute of limitations begins to run against action to recover money paid by mistake, 79 ALR3d 754.

Right of insurer under health or hospitalization policy to restitution of payments made under mistake, 79 ALR3d 1113.

23-2-25. Form of conveyance contrary to intent.

If the form of conveyance is, by accident or mistake, contrary to the intention of the parties in their contract, equity shall interfere to make it conform thereto. (Orig. Code 1863, § 3047; Code 1868, § 3059; Code 1873, § 3114; Code 1882, § 3114; Civil Code 1895, § 3970; Civil Code 1910, § 4567; Code 1933, § 37-215.)

Law reviews. — For comment advocating principle that grantee may obtain reformation of deed of gift over

opposition of heirs of grantor, see 25 Ga. B.J. 445 (1963).

JUDICIAL DECISIONS

Reformation as applied to a contract is a remedy cognizable in equity for the purpose of correcting an instrument so as to make it express the true intention of the parties, where from some cause, such as fraud, accident, or mistake it does not express such intention. The remedy is not available for the purpose of making a new

and different contract for the parties, but is confined to establishment of the actual agreement. *Deck v. Shields*, 195 Ga. 697, 25 S.E.2d 514 (1943).

Where the form of the conveyance or instrument is, by mutual mistake, contrary to the intention of the parties equity will interfere to make it conform thereto.

In such cases, it is wholly immaterial from what cause the defective execution of the intent of the parties originated. *Hill v. Agnew*, 199 Ga. 644, 34 S.E.2d 702 (1945); *Sheldon v. Hargrore*, 213 Ga. 672, 100 S.E.2d 898 (1957).

Where personal property is sold, and a bill of sale with warranty of title is executed by the vendor, and the property is again sold with warranty of title, the last vendee and his vendor may join in an equitable petition against the original vendor, having for its purpose the reformation of the original bill of sale by including certain items of property omitted therefrom by mutual mistake. *Chapman v. Cassels Co.*, 180 Ga. 349, 179 S.E. 91 (1935).

Where the plaintiffs sued as remaindermen to recover undivided interests in land after death of the life tenant, relying on a deed which by its terms plainly vested in them the remainder interest claimed, and the defendant contended that the deed had been so reformed by an equitable decree for reformation of the deed, rendered 50 years earlier, as to vest the fee-simple title in the person originally named as life tenant, from whom he purchased, the so-called decree of reformation was void, for the reason that it was based upon a petition that did not state a cause of action for reformation, and did not contain enough to amend by as related to such relief, therefore the evidence demanded a verdict for the plaintiffs. *Deck v. Shields*, 195 Ga. 697, 25 S.E.2d 514 (1943).

Where a petition is brought by assignee for reformation of a written lease and option agreement, alleging a valuable consideration, and that permanent improvements had been made on the property involved, and that an alleged inadequate description of the property had been made by mistake of the scrivener, it having been the intention of the parties that the description contended for be inserted in the agreement, and further alleging that unless so reformed an unconscionable advantage would be acquired by the defendant, such allegations state a case for reformation of the lease and option agreement. *Martin v. Oakhurst Dev. Corp.*, 197 Ga. 288, 29 S.E.2d 179 (1944).

In action for specific performance of option agreement to convey land, plaintiff may have description of land reformed so as to fulfill parties' intention. *Martin v. Oakhurst Dev. Corp.*, 197 Ga. 288, 29 S.E.2d 179 (1944).

Cited in *Cheatham v. Palmer*, 178 Ga. 223, 172 S.E. 462 (1934); *McCollum v. Loveless*, 187 Ga. 262, 200 S.E. 115 (1938); *Bender v. Randall Bros.*, 189 Ga. 197, 5 S.E.2d 889 (1939); *Gibbs v. H.T. Henning Co.*, 189 Ga. 675, 7 S.E.2d 238 (1940); *Redmond v. Sinclair Ref. Co.*, 204 Ga. 699, 51 S.E.2d 409 (1949); *Srochi v. Postell*, 206 Ga. 59, 55 S.E.2d 603 (1949); *Flagg v. Hedrick*, 215 Ga. 16, 108 S.E.2d 703 (1959); *Polk v. Sherod*, 240 Ga. 680, 242 S.E.2d 157 (1978).

RESEARCH REFERENCES

ALR. — Does right of grantor to maintain a suit in equity to set aside his conveyance for cause survive to his heir, 33 ALR 51.

Power of equity in absence of statute to render deficiency judgment in foreclosure action, 34 ALR 1015.

Right to reformation of contract or instrument as affected by intervening rights of third persons, 44 ALR 78; 79 ALR2d 1180.

Right to reformation of conveyance as depending upon consideration, 69 ALR 423; 128 ALR 1299.

Right of present claimant of title as against original or intermediate grantor to reformation to correct error in description common to conveyances in chain of title, 89 ALR 1444.

Reformation on ground of mutual mistake regarding character or extent of estate or title imported by language used in instrument, 141 ALR 826.

Incontestable clause as applicable to suit to reform insurance policy, 7 ALR2d 504.

23-2-26. Accident or mistake in execution of power.

Accident or mistake in the execution of a power or causing the defective execution of the power will be remedied in equity. (Orig. Code 1863, § 3061; Code 1868, § 3073; Code 1873, § 3128; Code 1882, § 3128; Civil Code 1895, § 3986; Civil Code 1910, § 4583; Code 1933, § 37-218.)

RESEARCH REFERENCES

ALR. — Mistake by one party to contract as to identity of other party who acted in good faith, 147 ALR 1171.

23-2-27. When equitable interference not authorized — Mere ignorance of law.

Mere ignorance of the law on the part of the party himself, where the facts are all known and there is no misplaced confidence and no artifice, deception, or fraudulent practice is used by the other party either to induce the mistake of law or to prevent its correction, shall not authorize the intervention of equity. (Orig. Code 1863, § 3054; Code 1868, § 3066; Code 1873, § 3121; Code 1882, § 3121; Civil Code 1895, § 3978; Civil Code 1910, § 4575; Code 1933, § 37-209.)

JUDICIAL DECISIONS

This section does not prevent the granting of relief where all the facts are not known by reason of the fraud of one of the parties. *Wellborn v. Johnson*, 204 Ga. 389, 50 S.E.2d 16 (1948).

Equitable relief requires inequitable conduct by other party. — Equity has jurisdiction to reform a written instrument where there has been ignorance or mistake on the part of one of the parties, accompanied by fraud or inequitable conduct on the part of the other party. *Wellborn v. Johnson*, 204 Ga. 389, 50 S.E.2d 16 (1948).

If the fraud or inequitable conduct complained of consists of an alleged misrepresentation of fact, it is immaterial whether the party making the misrepresentation knows it to be false or not; it is nonetheless fraud in law, even

though not fraud in fact. *Wellborn v. Johnson*, 204 Ga. 389, 50 S.E.2d 16 (1948).

A simple mistake by a party as to the legal effect of an agreement which he executes, or as to the legal result of an act which he performs, is no ground for either defensive or affirmative relief. *Robbins v. National Bank*, 241 Ga. 538, 246 S.E.2d 660 (1978).

Cited in *Sapp v. Ritch*, 169 Ga. 33, 149 S.E. 636 (1929); *Paris v. Treadaway*, 173 Ga. 639, 160 S.E. 797 (1931); *Dunson v. First Nat'l Bank*, 175 Ga. 79, 164 S.E. 815 (1932); *Nalley v. New York Life Ins. Co.*, 48 F. Supp. 470 (N.D. Ga. 1943); *Wood v. Claxton*, 199 Ga. 809, 35 S.E.2d 455 (1945); *Stein Steel & Supply Co. v. K. & L. Enterprises, Inc.*, 97 Ga. App. 71, 102 S.E.2d 99 (1958).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Equity, § 34.

C.J.S. — 30 C.J.S., Equity, § 44 et seq.

ALR. — Ignorance of legal right to avoid contract or conveyance made during infancy as affecting ratification thereof upon attaining majority, 5 ALR 137.

Right to cancellation in equity of an instrument not invalid on its face in which

one is named as a party without his consent, 51 ALR 867.

Misrepresentation as to tax law as within rule that party to contract or other instrument may not rely upon misrepresentations as to matters of law, 153 ALR 538.

Misrepresentation as to matters of foreign law as actionable, 24 ALR2d 1039.

23-2-28. Same — Mutual ignorance of fact; mistake in judgment of value.

Ignorance of a fact by both parties shall not justify the interference of equity; nor shall a mistake in judgment or opinion merely as to the value of property authorize such interference. (Orig. Code 1863, § 3060; Code 1868, § 3072; Code 1873, § 3127; Code 1882, § 3127; Civil Code 1895, § 3985; Civil Code 1910, § 4582; Code 1933, § 37-210.)

JUDICIAL DECISIONS

Lack of knowledge is not considered a mistake of fact for purposes of reformation. B.L. Ivey Constr. Co. v. Pilot Fire & Cas. Co., 295 F. Supp. 840 (N.D. Ga. 1968).

A mere mistake in judgment or opinion as to the value of property does not authorize interference by the courts. Hargrove v. Bledsoe, 78 Ga. App. 107, 50 S.E.2d 223 (1948).

Cited in Beddingfield v. Old Nat'l Bank & Trust Co., 175 Ga. 172, 165 S.E. 61 (1932); Dobbs v. Perlman, 59 Ga. App. 770, 2 S.E.2d 109 (1939); Sawyer Coal & Ice Co.

v. Kinnett-Odom Co., 192 Ga. 166, 14 S.E.2d 879 (1941); Orient Ins. Co. v. Dunlap, 193 Ga. 241, 17 S.E.2d 703 (1941); Nalley v. New York Life Ins. Co., 43 F. Supp. 470 (N.D. Ga. 1943); City of Jefferson v. Trustees of Martin Inst., 199 Ga. 71, 33 S.E.2d 354 (1945); Wheeler v. Poole, 204 Ga. 477, 50 S.E.2d 326 (1948); Adler v. Adler Co., 205 Ga. 818, 55 S.E.2d 13 (1949); James v. Tarpley, 209 Ga. 421, 73 S.E.2d 188 (1952); Cline v. Schuster, 221 Ga. 653, 146 S.E.2d 732 (1966); Long v. Walls, 226 Ga. 737, 177 S.E.2d 373 (1970).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Equity, § 22.

C.J.S. — 30 C.J.S., Equity, § 44 et seq.

ALR. — Conscious ignorance of fact, as distinguished from mistake of fact, as ground for reformation of contract, 137 ALR 908.

Relief, by way of rescission or adjustment of purchase price, for mutual mistake as to quantity of land, where contract of sale

fixes compensation at a specified rate per acre or other area unit, 153 ALR 4.

Mistake as to existence, practicability of removal, or amount of minerals as ground for relief from mineral lease, 163 ALR 878.

Relief by way of rescission or adjustment of purchase price for mutual mistake as to quantity of land, where the sale is in gross, 1 ALR2d 9.

Avoidance of release of personal injury

claims on ground of fraud or mistake as to the extent or nature of injuries, 71 ALR2d 82.

Effect, as between stockbroker and customer, of broker's mistaken sale of secu-

rity other than that intended by customer, 48 ALR3d 513.

Vendor and purchaser: mutual mistake as to physical condition of realty as ground for rescission, 50 ALR3d 1188.

23-2-29. Same — Failure to exercise diligence; ignorance of fact absent fraud.

If a party, by reasonable diligence, could have had knowledge of the truth, equity shall not grant relief; nor shall the ignorance of a fact known to the opposite party justify an interference if there has been no misplaced confidence, misrepresentation, or other fraudulent act. (Orig. Code 1863, § 3059; Code 1868, § 3071; Code 1873, § 3126; Code 1882, § 3126; Civil Code 1895, § 3984; Civil Code 1910, § 4581; Code 1933, § 37-211.)

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

REASONABLE DILIGENCE

1. IN GENERAL
2. DUTY TO READ WRITTEN INSTRUMENTS

General Consideration

This section was not intended to lodge any arbitrary discretion in judge or jury to deny reformation on the ground that the party seeking relief could by reasonable diligence have had knowledge of the mistake. *Bender v. Randall Bros.*, 189 Ga. 197, 5 S.E.2d 889 (1939).

Elements essential to equitable relief. — Two essential elements must affirmatively appear before a court of equity will be authorized to relieve a purchaser from his bid because of mistake of fact; the exercise of ordinary diligence in discovering the truth, and the fact that the relief will not prejudicially affect the rights of anyone. *Kurfees v. Davis*, 178 Ga. 429, 173 S.E. 157 (1934).

Equity will not relieve a person from his erroneous acts or omissions resulting from his own negligence. *Mangham v. Hotel & Restaurant Supply Co.*, 107 Ga. App. 619, 131 S.E.2d 74 (1963).

Cited in *Harrison v. Hester*, 160 Ga. 865, 129 S.E. 528 (1925); *Paris v. Treadaway*, 173 Ga. 639, 160 S.E. 797 (1931); *McCommons v. Greene County*, 53 Ga. App. 171, 184 S.E. 897 (1936); *Dobbs v. Perlman*, 59 Ga. App. 770, 2 S.E.2d 109 (1939); *J. Kuniansky, Inc. v. Ware*, 192 Ga. 488, 15 S.E.2d 783 (1941); *Hill v. Agnew*, 202 Ga. 759, 44 S.E.2d 653 (1947); *Loyd v. Loyd*, 203 Ga. 775, 48 S.E.2d 365 (1948); *Whitfield v. Whitfield*, 204 Ga. 64, 48 S.E.2d 852 (1948); *Tillman v. Byrd*, 211 Ga. 918, 89 S.E.2d 479 (1955); *Peerless Cas. Co. v. Housing Auth.*, 228 F.2d 376 (5th Cir. 1955); *Charles v. Simmons*, 215 Ga. 794, 113 S.E.2d 604 (1960); *Dixie Belle Mills, Inc. v. Specialty Mach. Co.*, 217 Ga. 104, 120 S.E.2d 771 (1961); *Cline v. Schuster*, 221 Ga. 653, 146 S.E.2d 732 (1966); *Vinson v. Citizens & S. Nat'l Bank*, 223 Ga. 54, 153 S.E.2d 436 (1967); *D.H. Overmyer Co. v. Joe Summers Roofing Co.*, 120 Ga. App. 188, 169 S.E.2d 821

(1969); *Sikes v. Sikes*, 231 Ga. 105, 200 S.E.2d 259 (1973); *Martin v. Heard*, 239 Ga. 816, 238 S.E.2d 899 (1977); *Garden of Eden, Inc. v. Eastern Sav. Bank*, 244 Ga. 63, 257 S.E.2d 897 (1979).

Reasonable Diligence

1. In General

Courts of equity grant relief only in favor of the diligent. *City of Jefferson v. Trustees of Martin Inst.*, 199 Ga. 71, 33 S.E.2d 354 (1945).

The standard is one of reasonable diligence, and the defrauded party is not bound to exhaust all means at his command to ascertain the truth before relying upon the representations. *Funding Sys. Leasing Corp. v. Pugh*, 530 F.2d 91 (5th Cir. 1976).

Equity requires diligence in the protection of one's own rights. *Phillips v. Hayes*, 212 Ga. 148, 91 S.E.2d 19 (1956).

Equity requires diligence, and will not do for one that which he could have done for himself but for his own negligence. *Glens Falls Indem. Co. v. Liberty Mut. Ins. Co.*, 202 Ga. App. 752, 44 S.E.2d 543 (1947).

While equity will, on reasonable application, and under proper circumstances, relieve a party from the injurious consequences of an act done under a mistake of fact, it will not do so if such party could, by reasonable diligence, have ascertained the truth as to the matter concerning which the mistake was made. *Adler v. Adler Co.*, 205 Ga. 818, 55 S.E.2d 13 (1949).

The duty rests upon a party who seeks to rescind a contract on the ground of fraud, to make such effort to discover the fraud as would in law amount to ordinary diligence. *Tingle v. Seignious*, 212 Ga. 71, 90 S.E.2d 408 (1955).

If one has made a bad bargain by her failure to acquaint herself with facts which were easily ascertainable, a court of equity will not aid her in rescinding her contract to purchase by decreeing a cancellation of it. *Tingle v. Seignious*, 212 Ga. 71, 90 S.E.2d 408 (1955).

While § 23-2-31 provides that equity may rescind and cancel a written contract upon the ground of mistake of fact material to the contract of one party only, ignorance of fact is no cause for rescinding a contract; and where by reasonable dili-

gence the plaintiff could have ascertained the extent of his injuries, and there was no necessity for his rushing into a settlement, § 9-3-33 giving him two years in which to bring an action to recover for such injuries, a court of equity will not relieve him from the injurious, unwise, or disadvantageous consequences of his own act in executing a release. *James v. Tarpley*, 209 Ga. 421, 73 S.E.2d 188 (1952).

Where two contracting parties deal at arms length with one another, and a written instrument is entered into and signed, and there is no evidence of artifice or fraud, and each party had ample opportunity to inform himself as to the amounts claimed due, and a party negligently omitted to take such precautions as would reasonably serve to protect himself, the defense of mistake of fact, if there is one, is obviously caused by the party's own neglect and is not available as a defense. *Berry v. Atlas Metals, Inc.*, 152 Ga. App. 437, 263 S.E.2d 179 (1979).

A court of equity will not relieve a vendor of land from his own negligence in not ascertaining facts which he could have ascertained by diligence, the vendee using no artifice or fraudulent scheme in order to prevent the vendor from ascertaining facts which might have prevented him from executing the deed sought to be canceled on account of the alleged fraud on the part of the vendee. *Browning v. Richardson*, 181 Ga. 413, 182 S.E. 516 (1935).

A contractor who has bid for the excavation of highway sites on a basis of "unclassified material" may not, under the guise of mistake of fact, seek additional compensation in an action at law because the material excavated contained a higher percentage of rock than it expected, even though its only information at the time of the bid was results of test borings made available to it by the highway department (now Department of Transportation), where it was specifically stipulated that the data were not guaranteed and did not bind the department; where the department furnished all information which it had available, made no attempt to conceal actual conditions, and stipulated the provisional character of its tests, where the contractor had equal opportunity with the department to conduct its own investiga-

tion, and where the parties with knowledge of these facts elected to contract on a basis of material moved rather than to contract on a basis of the percentage of dirt and rock after removal. *State Hwy. Dep't v. MacDougald Constr. Co.*, 102 Ga. App. 254, 115 S.E.2d 863 (1960).

Materialmen are charged with knowledge of the premises upon which they filed their claim of lien, with knowledge of the premises to which they delivered the materials, and where they knew that these premises differed, in plenty of time to properly record a claim of lien as required by law, they cannot seek the aid of a court of equity to relieve them from their own negligence. *King v. Rutledge*, 208 Ga. 172, 65 S.E.2d 801 (1951).

Plaintiff's petition to cancel and declare void her acknowledgement of service and to set aside the judgment probating a will on the alleged ground of fraud failed to state a cause of action for the relief sought, since the plaintiff by an exercise of the slightest degree of diligence could have ascertained and asserted in the probate proceeding the falsity of the act upon which she relied to set aside the probate judgment. *Ingram v. Rooks*, 221 Ga. 701, 146 S.E.2d 743 (1966).

Where the terms of an instrument express the intent of the parties at the time the contract is made, as they are then informed, in the absence of any allegation of fraud, misrepresentation, or misplaced confidence, equity will not interfere to relieve on account of ignorance of a fact by one of the parties, if by the exercise of due diligence he might have ascertained the truth. *Hargrove v. Bledsoe*, 78 Ga. App. 107, 50 S.E.2d 223 (1948).

While the doctrine of caveat emptor would charge the purchaser with looking out for the title which the seller had to the tract offered for sale as his, it would not charge him with looking out for the boundaries of that tract when the seller undertook to locate and point them out, thus professing to know them sufficiently to enable them to furnish this information to purchasers instead of leaving the latter to their own resources in acquiring the information. *Bonner v. Cotton*, 223 Ga. 843, 159 S.E.2d 61 (1968).

2. Duty to Read Written Instruments

One executing a contract or deed has the duty to read it and that negligence in not reading it before it is sent to one who acted in good faith can bar reformation by the negligent party. *B.L. Ivey Constr. Co. v. Pilot Fire & Cas. Co.*, 295 F. Supp. 840 (N.D. Ga. 1968).

One about to sign a written instrument cannot rely blindly upon the representations of other parties as to its contents, and if, without an emergency or fraud inducing him not to read it, he signs without reading, he cannot hold the other party responsible for his statements, though they be false. *Livingston v. Barnett*, 193 Ga. 640, 19 S.E.2d 385 (1942).

Where one, while negotiating for the purchase of realty, has an opportunity to examine it before agreeing to buy, but fails to do so and voluntarily relies on statements made by the seller concerning its character and value, a written contract to sell and purchase the property subsequently executed by the contracting parties will not, on petition therefor by the purchaser, be rescinded and set aside because of the falsity of such statements, unless some fraud or artifice was practiced by the seller to prevent such examination by the purchaser; and this is true although the purchaser in agreeing to buy relied upon the seller's representations as to the character and value of the property as being true, and in consequence of such reliance acted to his injury. *Tingle v. Seignious*, 212 Ga. 71, 90 S.E.2d 408 (1955).

Any representation, act, or artifice intended to deceive, and which does deceive another, is such a fraud as may authorize cancellation of a written contract, but a party to a contract who can read must read or show a legal excuse for not doing so, and ordinarily, if fraud is the excuse, it must be such fraud as prevents the party from reading; nor in such case will a mere fraudulent statement by the opposite party or his agent as to the contents of the writing furnish a legal excuse. And where the contract is a deed to land, the rule will generally apply to the grantee as well as the grantor. *Livingston v. Barnett*, 193 Ga. 640, 19 S.E.2d 385 (1942).

Where two contracting parties deal with each other at arms' length and on equal

terms, and where there is no such confidential relation between them as to justify special confidence reposed by one in the other, a written instrument entered into between them cannot be set aside upon the ground that the party seeking to be relieved was induced to enter in and sign the instrument in consequence of fraudulent representations as to its contents upon the part of the adverse party, when it appears that the party signing could read, that there was nothing to prevent him from reading the instrument, but that he did not do so, that there was no sufficient excuse for his failing to do so, but he signed after he had full opportunity to inform himself as to the terms of the instrument by reading it, but negligently omitted to read the same, when he could thus have informed himself of its contents. *Livingston v. Barnett*, 193 Ga. 640, 19 S.E.2d 385 (1942).

Where plaintiff signed a deed which was read to her by an attorney which she did not read herself, and there was no evidence that there were emergency circumstances of disabilities preventing her from reading the deed, the mere fact that the plaintiff signed the deed in a room where the shades were not put up and the blinds were not open, where it does not appear that she could not have raised the shades nor opened the blinds and let in sufficient light by which she could read the deed, is insufficient as an excuse for her not

reading the deed and becoming acquainted with its contents before she signed it. *McCommons v. Greene County*, 53 Ga. App. 171, 184 S.E. 897 (1936).

Equity will grant no relief in favor of one who buys land when he fails to exercise any diligence for his protection and asserts that he blindly relied on the representations of the seller as to matters of which he could have informed himself, and the same is true in the purchase of a stock of merchandise and fixtures. *Holmes v. Walker*, 207 Ga. 582, 63 S.E.2d 359 (1951).

While the inability of a plaintiff vendor, in an alleged fraudulent land sale case, to read the English language would be a circumstance which should be considered in determining whether or not he has been defrauded, the fact of such inability is not of itself sufficient to authorize the rescission of a contract. *Robertson v. Panlos*, 208 Ga. 116, 65 S.E.2d 400 (1951).

As a general rule, fraud voids all contracts; however, this rule is not applied in its entirety and without reservation to written contracts, for the reason that misrepresentations and false statements will not be heard in contradiction of the terms of a valid written instrument, unless it should appear that the party signing the same has been induced to sign by a fraud, trickery, artifice, or emergency happening at the time of such signing. *Livingston v. Barnett*, 193 Ga. 640, 19 S.E.2d 385 (1942).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Equity, §§ 22, 34, 43, 45, 82.

C.J.S. — 30 C.J.S., Equity, § 47.

ALR. — Negligence in executing contract as affecting right to have it reformed, 81 ALR2d 7.

23-2-30. Reformation and execution of contract in case of mistake distinguished.

A distinction exists between reforming a contract and executing a contract in case of mistake. To authorize the former, the court shall be satisfied by the evidence that the mistake was mutual; but the court may refuse to act in the latter case if the mistake is confined to the party refusing to execute. (Orig. Code 1863, § 3057; Code 1868, § 3069; Code 1873, § 3124; Code 1882, § 3124; Civil Code 1895, § 3981; Civil Code 1910, § 4578; Code 1933, § 37-208.)

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
REFORMATION OF CONTRACT
PROOF OF MISTAKE

General Consideration

The relief accorded by this section is relief which can be granted only by equity; in a simple action at law on a promissory note it is unavailable. *Franklin v. Sea Island Bank*, 111 Ga. App. 182, 141 S.E.2d 121 (1965).

Cited in *Wachovia Bank & Trust Co. v. Jones*, 166 Ga. 747, 144 S.E. 256 (1928); *Paris v. Treadaway*, 173 Ga. 639, 160 S.E. 797 (1931); *Cheatham v. Palmer*, 178 Ga. 223, 172 S.E. 462 (1934); *Sawyer Coal & Ice Co. v. Kinnett-Odom Co.*, 192 Ga. 166, 14 S.E.2d 879 (1941); *Orient Ins. Co. v. Dunlap*, 193 Ga. 241, 17 S.E.2d 703 (1941); *Wheeler v. Poole*, 204 Ga. 477, 50 S.E.2d 326 (1948); *William H. Benton Co. v. Irvindale Dairies, Inc.*, 224 Ga. 780, 164 S.E.2d 819 (1968).

Reformation of Contract

Reformation requires mutual mistake.

— Equity will not reform a written contract on account of a mistake unless the mistake was one of both parties. Some particular mutual mistake and how it occurred must be alleged and plainly shown. *Rawson v. Brosnan*, 187 Ga. 624, 1 S.E.2d 423 (1939).

Equity in a proper case may reform a written contract because of fraud on one side and mistake on the other; a contract may also be reformed for a mistake of both parties, but the evidence must show that the mistake was mutual. *Helton v. Shellnut*, 186 Ga. 185, 197 S.E. 287 (1938).

A petition for reformation of a written contract will lie where by mistake of the draftsman and by oversight of the parties, the writing does not embody or fully express the real contract of the parties. *McLoon v. McLoon*, 220 Ga. 18, 136 S.E.2d 740 (1964).

Reformation as applied to a contract is a remedy cognizable in equity for the purpose of correcting an instrument so as

to make it express the true intention of the parties, where from some cause, such as fraud, accident, or mistake it does not express such intention. The remedy is not available for the purpose of making a new and different contract for the parties, but is confined to establishment of the actual agreement. *Deck v. Shields*, 195 Ga. 697, 25 S.E.2d 514 (1943).

Although equity will not reform a written contract because of mistake as to the contents of the writing on the part of the complaining party, who is able to read but fails to do so, where no sufficient excuse appears as to why such party did not read the contract, such principle has not been extended to cases in which it is sought to reform written instruments on the ground of mutual mistake of fact. In all cases where the form of the conveyance or instrument is, by mutual mistake, contrary to the intention of the parties in their contract, equity will interfere to make it conform thereto. *Eaton Yale & Towne, Inc. v. Strickland*, 228 Ga. 430, 185 S.E.2d 923 (1971).

A mistake in reference to the description of land conveyed on the part of one grantee, acting on behalf of other grantees who were absent, is a mistake on the part of all of them; and where the same mistake was made by the grantor, there would be a mistake of all the parties, within the rule as to mutuality. *Lifsey v. Mims*, 193 Ga. 780, 20 S.E.2d 32 (1942).

The mere failure to discover a conflict between the terms of an oral contract as to what a policy of insurance is to contain and what it actually contains until after a loss occurs is a circumstance to be considered by the jury in determining the truth of the issue, but such failure to discover the discrepancy will not bar the reformation of the contract as a matter of law. *Georgia Farm Bureau Mut. Ins. Co. v. Wall*, 242 Ga. 176, 249 S.E.2d 588 (1978).

Insurance contracts are not immune to suits for reformation, even where the insurance company was acting through an agent whose actions may have been unauthorized. *Georgia Farm Bureau Mut. Ins. Co. v. Wall*, 242 Ga. 176, 249 S.E.2d 588 (1978).

The failure of a party to read a contract which is not signed by that party, such as a policy of insurance, does not bar reformation as a matter of law. *Georgia Farm Bureau Mut. Ins. Co. v. Wall*, 242 Ga. 176, 249 S.E.2d 588 (1978).

Proof of Mistake

Where mistake is relied on, the petition

must allege the particular mistake and show how it occurred. *Helton v. Shellnut*, 186 Ga. 185, 197 S.E. 287 (1938).

Evidence of mistake must be clear, decisive, etc. — To authorize a verdict reforming a deed upon the ground of mutual mistake, the evidence, like the petition, should at least by inference show the particular mistake and illustrate how it occurred; and the evidence must be clear, unequivocal, and decisive as to the mistake. *Helton v. Shellnut*, 186 Ga. 185, 197 S.E. 287 (1938).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Equity, §§ 35, 39.

C.J.S. — 30 C.J.S., Equity, § 44 et seq.

ALR. — Mistake in lease as ground for relief, 26 ALR 472.

Relief from contract of sale because of mistake as to amount of commodity which it calls for, 31 ALR 384.

Right to reformation of contract or instrument as affected by intervening rights of third persons, 44 ALR 78; 79 ALR2d 1180.

Attempt to reform contract as election of remedies precluding action to enforce contract as written or vice versa, 49 ALR 1513.

Right to reformation of conveyance as depending upon consideration, 69 ALR 423; 128 ALR 1299.

Mistaken belief that contract bound one's principal, and not himself personally, as ground for reformation, 71 ALR 1307.

Reformation of memorandum relied upon to take an oral contract out of the statute of frauds, 73 ALR 99.

Effect of alteration intended merely to correct mistake in instrument so as to conform it to original understanding, 73 ALR 652.

Right of present claimant of title as against original or intermediate grantor to reformation to correct error in description common to conveyances in chain of title, 89 ALR 1444.

Jurisdiction of court of law to avoid or reform release of claim for personal

injuries on ground of mutual mistake, 96 ALR 1144.

When does limitation or laches commence to run against suit to reform an instrument, 106 ALR 1338.

Right of third person entitled to maintain an action at law on a contract between other parties, or to garnish indebtedness thereunder, to maintain a suit for its reformation, 112 ALR 909.

Right of insurer to reformation of policy or other relief because of its own error, not due to misrepresentation by insured, in computing premiums, indemnity, or other benefits or options under policy, 125 ALR 1058.

Reformation of instrument on ground of mutual mistake as to legal significance of the terms used, 135 ALR 1452.

Reformation on ground of mutual mistake regarding character or extent of estate or title imported by language used in instrument, 141 ALR 826.

Mistake by one party to contract as to identity of other party who acted in good faith, 147 ALR 1171.

Mistake as to existence, practicability of removal, or amount of minerals as ground for relief from mineral lease, 163 ALR 878.

Right, after foreclosure, to reformation on ground of erroneous description originating in mortgage, 172 ALR 655.

Incontestable clause as applicable to suit to reform insurance policy, 7 ALR2d 504.

Negligence in executing contract as affecting right to have it reformed, 81 ALR2d 7.

Reformation of property insurance policy to correctly identify the person or interest insured, 25 ALR3d 580.

Reformation of insurance policy to

correctly identify risks and causes of loss, 32 ALR3d 661.

Reformation of usurious contract, 74 ALR3d 1239.

23-2-31. Rescission for unilateral mistake of fact.

Equity will not reform a written contract unless the mistake is shown to be the mistake of both parties; but it may rescind and cancel upon the ground of mistake of fact material to the contract of one party only. (Civil Code 1895, § 3982; Civil Code 1910, § 4579; Code 1933, § 37-207.)

History of section. — This section is derived from the decision in *Werner v. Rawson*, 89 Ga. 619, 15 S.E. 813 (1892).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

REFORMATION

RESCISSION

1. INSOLVENCY
2. IGNORANCE OF FACT
3. PROOF

General Consideration

The relief accorded by this section is relief which can be granted only by equity; in a simple action at law on a promissory note it is unavailable. *Franklin v. Sea Island Bank*, 111 Ga. App. 182, 141 S.E.2d 121 (1965).

Cited in *Brown v. Carmichael*, 149 Ga. 548, 101 S.E. 124 (1919); *Hooper v. Rucker*, 153 Ga. 306, 111 S.E. 901 (1922); *Edwards v. Rozar*, 155 Ga. 170, 116 S.E. 313 (1923); *Williams v. Williams*, 155 Ga. 622, 118 S.E. 195 (1923); *Paris v. Treadaway*, 173 Ga. 639, 160 S.E. 797 (1931); *Sawyer Coal & Ice Co. v. Kinnett-Odom Co.*, 192 Ga. 166, 14 S.E.2d 879 (1941); *Orient Ins. Co. v. Dunlap*, 193 Ga. 241, 17 S.E.2d 703 (1941); *Brooks v. Northwestern Mut. Life Ins. Co.*, 193 Ga. 522, 18 S.E.2d 860 (1942); *Nalley v. New York Life Ins. Co.*, 48 F. Supp. 470 (N.D. Ga. 1943); *Scott v. Gillis*, 202 Ga. 220, 43 S.E.2d 95 (1947); *Findley v. City of Vidalia*, 204 Ga. 279, 49 S.E.2d 658 (1948);

Wheeler v. Poole, 204 Ga. 477, 50 S.E.2d 326 (1948); *Hood v. Connell*, 204 Ga. 782, 51 S.E.2d 853 (1949); *Jackson v. Brown*, 209 Ga. 78, 70 S.E.2d 756 (1952); *Farmers Whse. of Pelham, Inc. v. Collins*, 220 Ga. 141, 137 S.E.2d 619 (1964); *Cline v. Schuster*, 221 Ga. 653, 146 S.E.2d 732 (1966); *Westbrook v. Nationwide Ins. Co.*, 113 Ga. App. 299, 147 S.E.2d 819 (1966); *Hartford Accident & Indem. Co. v. Walka Mt. Camp No. 565, Woodmen of World, Inc.*, 224 Ga. 194, 160 S.E.2d 833 (1968); *William H. Benton Co. v. Irvindale Dairies, Inc.*, 224 Ga. 780, 164 S.E.2d 819 (1968); *Seaboard Constr. Co. v. Clifton*, 121 Ga. App. 247, 173 S.E.2d 436 (1970); *Citizens Bank v. Barber*, 123 Ga. App. 507, 181 S.E.2d 545 (1971).

Reformation

Where mistake is relied on, the petition must allege the particular mistake and show how it occurred. *Helton v. Shellnut*, 186 Ga. 185, 197 S.E. 287 (1938).

The fact that a complainant does not in express terms allege that an instrument was erroneously executed through mutual mistake does not render it insufficient in law, if it alleges facts from which such a conclusion is reasonably deducible. *Steadham v. Cobb*, 183 Ga. 30, 196 S.E. 730 (1938).

A mistake that will justify reformation must be a mutual mistake. *McCullough v. Kirby*, 204 Ga. 738, 51 S.E.2d 812 (1949).

Equity will not reform a written contract on account of a mistake unless the mistake was one of both parties; some particular mutual mistake and how it occurred must be alleged and plainly shown. *Rawson v. Brosnan*, 187 Ga. 624, 1 S.E.2d 423 (1939).

Rescission

1. Insolvency

Insolvency as basis for rescission of contract. — The grantor may maintain an equitable action to rescind the contract if the grantee is insolvent, or where fraud is employed by the grantee in the procurement of the deed, or there are other special facts which would make rescission by the grantor an appropriate relief. Although insolvency is frequently relied upon, breach of a contract for care and maintenance of the grantor upon the property conveyed present such special facts as authorize rescission. *Head v. Walker*, 243 Ga. 108, 252 S.E.2d 440 (1979).

While an absolute deed of conveyance will not be canceled, at the instance of the grantor, merely because of a breach by the grantee of a promise made by him, in consideration of which the deed was executed, and the remedy of the grantor in such a case is a suit for damages for such breach, yet where the grantee was insolvent, and 49 shares of stock were transferred to her in consideration of her learning the plaintiff's business and assisting in its operation, which service she failed and refused to render to the plaintiff, equity would decree a cancellation of the stock certificate and restore the same to the grantor. *McGhee v. Minor*, 188 Ga. 635, 4 S.E.2d 565 (1939).

2. Ignorance of Fact

Ignorance of fact insufficient as basis for rescission of contract. — While this

section provides that equity may rescind and cancel a written contract upon the ground of mistake of fact material to the contract of one party only, ignorance of fact is no cause for rescinding a contract; and where by reasonable diligence the plaintiff could have ascertained the extent of his injuries, and there was no necessity for his rushing into a settlement, § 9-3-33 giving him two years in which to bring an action to recover for such injuries, a court of equity will not relieve him from the injurious, unwise, or disadvantageous consequences of his own act in executing a release. *James v. Tarpley*, 209 Ga. 421, 73 S.E.2d 188 (1952).

A contractor who has bid for the excavation of highway sites on a basis of "unclassified material" may not, under the guise of mistake of fact, seek additional compensation in an action at law because the material excavated contained a higher percentage of rock than it expected, even though its only information at the time of the bid was results of test borings made available to it by the highway department (now Department of Transportation), where it was specifically stipulated that the data were not guaranteed and did not bind the department; where the department furnished all information which it had available, made no attempt to conceal actual conditions, and stipulated the provisional character of its tests, where the contractor had equal opportunity with the department to conduct its own investigation, and where the parties with knowledge of these facts elected to contract on a basis of material moved rather than to contract on a basis of the percentage of dirt and rock after removal. *State Hwy. Dep't v. MacDougald Constr. Co.*, 102 Ga. App. 254, 115 S.E.2d 863 (1960).

Where the intention of both the insurer and the insured as to the amount of the premium is expressed in the application, as corrected by the insurer as therein authorized, to be \$302.90 per quarter, a mistake of the draftsman of the insurer in writing into the policy at another place the amount of the premium as being \$750.48 per year, instead of what the insurer claims to have been intended, \$750.48 per quarter, is obviously the unilateral mistake of the insurer alone, and there is neither mutuality nor fraud that would authorize

reformation to conform with what the insurer claims to have been intended. *Davis v. United Am. Life Ins. Co.*, 215 Ga. 521, 111 S.E.2d 488 (1959).

3. Proof

Equitable relief for unilateral mistake requires evidence of fraud. — Equity will

grant appropriate relief for a mistake of fact by one party, accompanied by fraud on the part of the other, just as in cases where there is mutual mistake. *J. Kuniansky, Inc. v. Ware*, 192 Ga. 488, 15 S.E. 2d 783 (1941).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Equity, §§ 33, 35, 39.

C.J.S. — 30 C.J.S., Equity, § 44 et seq.

ALR. — Rescission of sale of corporate stock on account of mutual mistake due to error in corporate books, 5 ALR 255.

Relief from contract of sale because of mistake as to amount of commodity which it calls for, 31 ALR 384.

Right to reformation of contract or instrument as affected by intervening rights of third persons, 44 ALR 78; 79 ALR2d 1180.

Right to cancellation in equity of an instrument not invalid on its face in which one is named as a party without his consent, 51 ALR 867.

Unilateral mistake as basis of bill in equity to rescind the contract, 59 ALR 809.

Mistaken belief that contract bound one's principal, and not himself personally, as ground for reformation, 71 ALR 1307.

Reformation of memorandum relied upon to take an oral contract out of the statute of frauds, 73 ALR 99.

Right of present claimant of title as against original or intermediate grantor to reformation to correct error in description common to conveyances in chain of title, 89 ALR 1444.

Right of vendor in contract for sale or exchange of real property to bring suit for forfeiture, foreclosure, or rescission, or to quiet title or recover possession, without first giving notice, or making demand for possession, 94 ALR 1239.

Action involving rescission or right to rescind contract and to recover amount paid thereunder as one at law or in equity, 95 ALR 1000.

Jurisdiction of court of law to avoid or reform release of claim for personal

injuries on ground of mutual mistake, 96 ALR 1144.

Avoidance on ground of fraud, mistake, duress, or mental incompetency of otherwise validly effected change of beneficiaries of insurance policies, 105 ALR 950.

Assignability of right to rescind or of right to return of money or other property as incident of rescission, 110 ALR 849; 162 ALR 743.

Right of third person entitled to maintain an action at law on a contract between other parties, or to garnish indebtedness thereunder, to maintain a suit for its reformation, 112 ALR 909.

Rescission of contract as affecting right to recover damages for fraud in procuring it, 120 ALR 1154.

Concealment of fact that one of parties to land contract was acting for third person, or misrepresentation as to identity of party for whom he was acting as reason for denying specific performance, or for rescission of contract, 121 ALR 1162.

Right of insurer to reformation of policy or other relief because of its own error, not due to misrepresentation by insured, in computing premiums, indemnity, or other benefits or options under policy, 125 ALR 1058.

Reformation on ground of mutual mistake regarding character or extent of estate or title imported by language used in instrument, 141 ALR 826.

Mistake by one party to contract as to identity of other party who acted in good faith, 147 ALR 1171.

Partial rescission of contract, 148 ALR 417.

Mistake as to existence, practicability of removal, or amount of minerals as ground

for relief from mineral lease, 163 ALR 878.

Relief by way of rescission or adjustment of purchase price for mutual mistake as to quantity of land, where the sale is in gross, 1 ALR2d 9.

Mistake, accident, inadvertence, etc., as ground for relief from termination or forfeiture of oil or gas lease for failure to complete well, commence drilling, or pay rental, strictly on time, 5 ALR2d 993.

Venue of action for rescission or cancellation of contract relating to interests in land, 77 ALR2d 1014.

Negligence in executing contract as

affecting right to have it reformed, 81 ALR2d 7.

Reformation of property insurance policy to correctly identify the person or interest insured, 25 ALR3d 580.

Right of bank certifying check or note by mistake to cancel, or avoid effect of, certification, 25 ALR3d 1367.

Vendor and purchaser: mutual mistake as to physical condition of realty as ground for rescission, 50 ALR3d 1188.

Reformation of usurious contract, 74 ALR3d 1239.

23-2-32. When negligent complainant granted relief.

(a) The negligence of the complaining party, preventing relief in equity, is that want of reasonable prudence, the absence of which would be a violation of legal duty.

(b) Relief may be granted even in cases of negligence by the complainant if it appears that the other party has not been prejudiced thereby. (Civil Code 1895, § 3974; Civil Code 1910, § 4571; Code 1933, § 37-212.)

History of section. — This section is derived from the decision in *Werner v. Rawson*, 89 Ga. 619, 15 S.E. 813 (1892).

JUDICIAL DECISIONS

This section is a codification from the decision of *Werner v. Rawson*, 89 Ga. 619, 15 S.E. 813 (1892). *McCollum v. Loveless*, 187 Ga. 262, 200 S.E. 115 (1938); *Livingston v. Barnett*, 193 Ga. 640, 19 S.E.2d 385 (1942); *Hargrove v. Bledsoe*, 78 Ga. App. 107, 50 S.E.2d 223 (1948).

This section does not entitle a party to relief against the consequences of gross and inexcusable negligence in signing his name to a plain and unambiguous written instrument, when no fraud, artifice, or misrepresentation was employed to induce him to sign it, and when there is nothing to show that it did not embody the identical agreement which the other party actually intended to make. *Holton Dodge, Inc. v. Baird*, 118 Ga. App. 316, 163 S.E.2d 346 (1968).

Equity will not reform a written contract because of mistake as to the contents of the writing on the part of the complaining party (who was able to read), and fraud of the other which consists only in making false representations as to such contents, on which the complaining party relied as true because of confidence in the party making them; no fiduciary or confidential relation existed between the parties, and no sufficient excuse appears why the complaining party did not read the contract. This doctrine does not apply if the party seeking relief shows some good excuse for not reading the instrument. *Livingston v. Barnett*, 193 Ga. 640, 19 S.E.2d 385 (1942).

Where no confidential relationship between the parties is alleged, a court of equity will not relieve a vendor of land

from his own negligence in not ascertaining facts which he could have ascertained by diligence, the vendee using no artifice or fraudulent scheme in order to prevent the vendor from ascertaining facts which might have prevented him from executing the deed sought to be canceled. *Jackson v. Brown*, 209 Ga. 78, 70 S.E.2d 756 (1952).

Petition of negligent complainant subject to motion to dismiss. — This section does not save a petition from a demurrer (now motion to dismiss) where the allegations, construed on demurrer (now motion to dismiss) most strongly against the petitioner, show affirmatively that the petitioner was guilty of negligence amounting to a violation of legal duty, and it does not appear that the other party was not prejudiced thereby. *Glens Falls Indem. Co. v. Liberty Mut. Ins. Co.*, 202 Ga. App. 752, 44 S.E.2d 543 (1947).

But it is not essential that complainants should be clear of all vestige of fault or negligence on their part. *Dollar v. Fred W. Amend Co.*, 184 Ga. 432, 191 S.E. 696 (1937).

And the negligence of the party complaining will not defeat his right to reformation, if the other party has not been prejudiced thereby. *Sheldon v. Hargrope*, 213 Ga. 672, 100 S.E.2d 898 (1957).

A petition which alleges that an instrument in the form of a deed, which was signed by an elderly, illiterate man who thought he was executing a will, and prays for cancellation on the ground of mistake does not show, on its face, negligence amounting to a violation of a legal duty so as to render the petition demurrable (now subject to motion to dismiss). *Jackson v. Jackson*, 202 Ga. 634, 44 S.E.2d 250 (1947).

Lack of diligence constitutes negligence. — Where both the appellant and counsel for the appellant could have with reasonable diligence discovered that the note in question bore interest from the date of its execution, the failure to exercise such diligence was negligence, which precluded reformation on ground of mutual mistake, since the appellee has been prejudiced by

that negligence. *Cox v. Smith*, 244 Ga. 280, 260 S.E.2d 310 (1979).

Courts of equity grant relief only in favor of the diligent, and equity does not relieve from a judgment which could have been prevented except for negligence on the part of the complaining party. *West v. Downer*, 218 Ga. 235, 127 S.E.2d 359 (1962).

The failure of a petitioner to know the content defining the coverage of its insurance contract or to compare the facts and circumstances surrounding the injury to ascertain if it was covered thereby, and its failure to inquire of the employer or the Industrial Board (now Board of Workers' Compensation) as to the existence of an insurance contract with another insurance carrier that covered the injury, amounted to negligence on the part of the petitioner, and would not constitute such a mistake of fact as would render the agreement and the payments thereunder involuntary and, therefore, a basis for subrogation. *Glens Falls Indem. Co. v. Liberty Mut. Ins. Co.*, 202 Ga. 752, 44 S.E.2d 543 (1947).

Cited in *Harrison v. Hester*, 160 Ga. 865, 129 S.E. 528 (1925); *Crim v. Alston*, 169 Ga. 852, 151 S.E. 807 (1930); *Chapman v. Cassels Co.*, 180 Ga. 349, 179 S.E. 91 (1935); *Young v. Hirsch*, 187 Ga. 1, 199 S.E. 179 (1938); *J. Kuniansky, Inc. v. Ware*, 192 Ga. 488, 15 S.E.2d 783 (1941); *Scott v. Gillis*, 202 Ga. 220, 43 S.E.2d 95 (1947); *Mulkey v. Spicer*, 202 Ga. 592, 43 S.E.2d 661 (1947); *Tillman v. Byrd*, 211 Ga. 918, 89 S.E.2d 479 (1955); *Flagg v. Hedrick*, 215 Ga. 16, 108 S.E.2d 703 (1959); *Cline v. Schuster*, 221 Ga. 653, 146 S.E.2d 732 (1966); *Finch v. McAloney*, 222 Ga. 174, 149 S.E.2d 100 (1966); *Vinson v. Citizens & S. Nat'l Bank*, 223 Ga. 54, 153 S.E.2d 436 (1967); *Long v. Walls*, 226 Ga. 737, 177 S.E.2d 373 (1970); *Eaton Yale & Towne, Inc. v. Strickland*, 228 Ga. 430, 185 S.E.2d 923 (1971); *J.C. Penney Co. v. West*, 140 Ga. App. 110, 230 S.E.2d 66 (1976); *Funding Sys. Leasing Corp. v. Pugh*, 530 F.2d 91 (5th Cir. 1976); *Garden of Eden, Inc. v. Eastern Sav. Bank*, 244 Ga. 63, 257 S.E.2d 897 (1979).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Equity, §§ 22, 34, 43, 45, 82.

C.J.S. — 30 C.J.S., Equity, § 47. 37 C.J.S., Fraud, § 28 et seq.

ALR. — Liability of publisher for mis-

take in advertisement, 10 ALR2d 686.

Negligence in executing contract as affecting right to have it reformed, 81 ALR2d 7.

23-2-33. Mere volunteers, in general; exception for executed contracts.

Equity will not interfere to relieve against accidents or mistakes of mere volunteers; but, if a contract is actually executed, all the rights growing out of it against or in favor of any one will be enforced. (Orig. Code 1863, § 3049; Code 1868, § 3061; Code 1873, § 3116; Code 1882, § 3116; Civil Code 1895, § 3972; Civil Code 1910, § 4569; Code 1933, § 37-217.)

JUDICIAL DECISIONS

Equity will not decree the reformation of an instrument at the instance of one who is a mere volunteer, and who was not a party to the instrument. *Sylvan Property Mgt., Inc. v. Garner*, 144 Ga. App. 747, 242 S.E.2d 292 (1978).

Cited in *Smith v. Carter*, 44 Ga. App. 438, 161 S.E. 649 (1931); *Dobbs v.*

Perlman, 59 Ga. App. 770, 2 S.E.2d 109 (1939); *Lifsey v. Mims*, 193 Ga. 780, 20 S.E.2d 32 (1942); *Glens Falls Indem. Co. v. Liberty Mut. Ins. Co.*, 202 Ga. App. 752, 44 S.E.2d 543 (1947); *Sylvan Property Mgt., Inc. v. Garner*, 144 Ga. App. 747, 242 S.E.2d 292 (1978).

23-2-34. Relief against original parties or privies; exception.

Equity will grant relief as between the original parties or their privies in law, in fact, or in estate, except bona fide purchasers for value without notice. (Orig. Code 1863, § 3052; Code 1868, § 3064; Code 1873, § 3119; Code 1882, § 3119; Civil Code 1895, § 3976; Civil Code 1910, § 4573; Code 1933, § 37-213.)

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

APPLICATION OF SECTION

1. PRIVIES

BONA FIDE PURCHASERS

General Consideration

This section is not limited by its terms to one remedy but applies to any equitable relief. Volunteer State Life Ins. Co. v. Powell-White Co., 187 Ga. 705, 1 S.E.2d 662 (1939).

Privity denotes successive relationship to the same right in the same property. Hilton v. Hilton, 202 Ga. 53, 41 S.E.2d 880 (1947).

The mere fact that plaintiff grantee and defendant grantee had entered into an agreement with the common grantor whereby each was to purchase separately from the common grantor one half of a described city lot, could not possibly constitute each grantee "an original party" to the deed of conveyance to the other within statute permitting reformation. Hilton v. Hilton, 202 Ga. 53, 41 S.E.2d 880 (1947).

It is an elementary principle of law that a privy, either in law, fact, or estate, has no greater right than the one with whom he is in privity, accordingly, since the plaintiff's father would have been estopped in law to attack and thus question the validity of the divorce which he procured from the plaintiff's mother, it logically follows that the plaintiff himself is also estopped to do so. Phillips v. Phillips, 211 Ga. 305, 85 S.E.2d 427 (1955).

Cited in Harrison v. Hester, 160 Ga. 865, 129 S.E. 528 (1925); Sapp v. Ritch, 169 Ga. 33, 149 S.E. 636 (1929); McCollum v. Loveless, 187 Ga. 262, 200 S.E. 115 (1938); Thomas v. Lambert, 187 Ga. 616, 1 S.E.2d 443 (1939); Ayers v. Carden, 212 Ga. 510, 93 S.E.2d 694 (1956); Empire Land Co. v. Stokes, 212 Ga. 707, 95 S.E.2d 283 (1956); Lanier v. American Cas. Co., 226 F. Supp. 630 (N.D. Ga. 1964).

Application of Section

1. Privies

Section extends equitable relief to privies to contract, etc. — The general rule, which allows only the parties to a judgment to attack and thus question its validity, has been relaxed in this state by this section, however, the privity either in law, in fact, or in estate, which will permit one to attack and thus question the validity of a judgment to which he is not a party has no personal basis as a mere matter of sentiment, but rests upon some actual

mutual or successive relationship as to the same right of property. Phillips v. Phillips, 211 Ga. 305, 85 S.E.2d 427 (1955).

But section extends no rights to one not privy under original contract. — Primarily the right to reform a contract belongs to the original parties thereto. The recognized extension, under this section, in favor of those in privity with the original contractors does not mean that the terms of a contract can be altered and reformed by one who does not claim as a successor under the contract sought to be reformed, but under another contract, setting up different and inconsistent rights. In such a case, the subsequent grantee's quarrel is with the person from whom he derived his title, rather than with the one holding adversely under a prior and different contract, to which he was admittedly neither party nor privy. Rawson v. Brosnan, 187 Ga. 624, 1 S.E.2d 423 (1939); Hilton v. Hilton, 202 Ga. 53, 41 S.E.2d 880 (1947).

Requirement of privity of contract, etc., applies to remedy of reformation and to remedy of cancellation. — The rule requiring mutuality or privity of contract or estate, applies not only to the equitable remedy of reformation but to that of cancellation or other equitable relief against the effect of an instrument. Volunteer State Life Ins. Co. v. Powell-White Co., 187 Ga. 705, 1 S.E.2d 662 (1939).

Where the plaintiff in ejectment was the prior grantee of the tract sued for, not being a privy in law, fact, or estate with the defendant, who held under a subsequent deed from the common grantor, the defendant could not defend by reforming the plaintiff's deed so as to strike therefrom, as having been included by mutual mistake, the tract subsequently conveyed to the defendant. Volunteer State Life Ins. Co. v. Powell-White Co., 187 Ga. 705, 1 S.E.2d 662 (1939).

Where personal property is sold, and a bill of sale with warranty of title is executed by the vendor, and the property is again sold with warranty of title, the last vendee and his vendor may join in an equitable petition against the original vendor, having for its purpose the reformation of the original bill of sale by including certain items of property omitted therefrom by mutual mistake. Chapman v. Cassels Co., 180 Ga. 349, 179 S.E. 91 (1935).

Where the absolute title to property is apparently in a vendor or mortgagor, the vendee or mortgagee is protected, unless the one seeking to set up a lien or trust against the property can show that the vendee or mortgagee had notice of trust funds having gone into the property. *Tattnall Bank v. Harvey*, 186 Ga. 752, 198 S.E. 724 (1938).

The mere fact that purchaser might have had some knowledge of a mingling by his vendor of trust funds with his own is not sufficient to charge the vendee with notice that trust funds had been diverted in the purchase of a particular piece of land. *Tattnall Bank v. Harvey*, 186 Ga. 752, 198 S.E. 724 (1938).

Where the original vendor of the land died intestate, and there was no administrator or personal representative of the decedent at the time the suit was brought, a suit could be maintained against the sole heir at law of the intestate, as he was apparently the only party who was interested in resisting the suit. *Steadham v. Cobb*, 183 Ga. 30, 196 S.E. 730 (1938).

A petition in equity by a husband seeking to cancel two concurrent verdicts and a decree obtained in the same court in a former divorce suit by the wife against her former husband, and to have declared the continued existence of the former marriage, thereby establishing incapacity of the wife to marry at the time of her marriage to the plaintiff, was subject to a general demurrer (now motion to dismiss). *Martocello v. Martocello*, 197 Ga. 629, 30 S.E.2d 108 (1944).

Bona Fide Purchasers

Section protects interests of bona fide purchasers. — It is a rule in equity that a bona fide purchaser without notice, to be entitled to protection, must be so, not only at the time of the contract or conveyance, but until the purchase money is actually paid. *Ross v. Rambo*, 195 Ga. 100, 23 S.E.2d 687 (1942).

A partial payment of the purchase money before notice of the equitable title of the true owners, although not sufficient to invest the vendee with the character of a bona fide purchaser as regards the entire estate purchased, will entitle him to invoke the aid of the equitable principle that he who asks equity must do equity and to be reimbursed for the amount actually paid before. *Ross v. Rambo*, 195 Ga. 100, 23 S.E.2d 687 (1942).

Where a husband contracts to buy land for value and directs conveyance thereof to his wife, no inference will arise that the wife is a purchaser for value, without notice of equities in favor of the vendor as against the vendee; and if the deed to the wife does not express the true agreement between the husband and the vendor, on account of mistake of the draftsman and mutual mistake of the vendor and the original vendee, the deed may be reformed so as to speak the true agreement. *Cain v. Varnadore*, 171 Ga. 497, 156 S.E. 216 (1930).

When a husband fraudulently seeks and obtains a divorce from his wife in a court of his selection, he and his privies in law, in fact, or in estate, are thereafter conclusively estopped to assail the validity of the decree to the prejudice of innocent parties. *Phillips v. Phillips*, 211 Ga. 305, 85 S.E.2d 427 (1955).

While it is the rule that a bona fide purchaser of property in which trust funds have been invested is protected, the beneficiary of a trust estate may at his option, within a reasonable time, "affirm or reject an unauthorized investment by the trustee," and equity will aid the beneficiary in recovering the funds or property, or enforcing a lien for the wrongfully used funds, provided that the assets can be traced and remain in the hands of a person "affected with notice of the misapplication." *Tattnall Bank v. Harvey*, 186 Ga. 752, 198 S.E. 724 (1938).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Equity, § 261.

C.J.S. — 31 C.J.S., Equity, § 133 et seq.

ALR. — Right of one who, with knowledge of outstanding equity, derived his interest in real property from or through a bona fide purchaser, to same protection as latter, 63 ALR 1362.

Bona fides of purchaser of bill or note on an executory consideration, 100 ALR 1357.

Right of lessee to equitable relief against forfeiture for breach of conditions as affected by lessor's giving a lease to or entering into other contractual obligations with a third person, 166 ALR 807.

What constitutes notice to subsequent purchaser of real property of option to purchase contained in unrecorded lease, 17 ALR2d 331.

Motor vehicle certificate of title or similar document as, in hands of one other than legal owner, indicia of ownership justifying

reliance by subsequent purchaser or mortgagee without actual notice of other interests, 18 ALR2d 813.

Rights as between purchaser of timber and subsequent vendee of land, 18 ALR2d 1150.

Relative rights in real property as between purchasers from or through decedent's heirs or devisees and unknown surviving spouse, 39 ALR2d 1082.

Extension of time or forbearance to sue as consideration constituting mortgagee bona fide purchaser, 39 ALR2d 1088.

Knowledge or notice of inadequacy of consideration for conveyance in chain of title as affecting bona fide status of purchaser, 42 ALR2d 1088.

Relative rights as between purchaser of chattel from one who had previously bought it with stolen money, and victim of the theft, 62 ALR2d 537.

ARTICLE 3

FRAUD

Cross references. — As to pleading requirements in actions involving fraud, see § 9-11-9. As to deceptive or unfair trade or business practices generally, see

§ 10-1-370 et seq. For further provisions regarding fraud in contracts, see §§ 13-4-60, 13-5-5. As to equitable estoppel, see § 24-4-27.

23-2-50. Concurrent jurisdiction over fraud.

In all cases of fraud, except fraud in the execution of a will, equity has concurrent jurisdiction with the law. (Orig. Code 1863, § 3103; Code 1868, § 3115; Code 1873, § 3172; Code 1882, § 3172; Civil Code 1895, § 4024; Civil Code 1910, § 4621; Code 1933, § 37-701.)

Cross references. — For further provisions regarding actions for fraud, deceit, etc., see Ch. 6, T. 51.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

EQUITABLE JURISDICTION DEPENDENT ON ADEQUACY OF LEGAL REMEDY
PLEADING AND PRACTICE

General Consideration

History generally. — This section was derived from *Trippe & Slade v. Ward*, 2 Ga. 304 (1847) and *DeLaperriere v. Williams*, 167 Ga. 648, 146 S.E. 482 (1929).

In all cases of fraud equity has concurrent jurisdiction with the law, but the court first taking cognizance of the case will retain it. *Jordan v. General Ins. Co. of America*, 92 Ga. App. 77, 88 S.E.2d 198 (1955).

Reluctance of equity to assume jurisdiction. — Though equity has concurrent jurisdiction with law in all cases of fraud except those in wills, unless some substantial equitable relief is sought, equity is reluctant to assume jurisdiction. *Walsh v. Campbell*, 130 Ga. App. 194, 202 S.E.2d 657 (1973).

Any misrepresentation intended to deceive and which does deceive is a fraud, for which a party is entitled to a remedy at law. *Oliver v. O'Kelley*, 48 Ga. App. 762, 173 S.E. 232 (1934).

Misrepresentation is one of the grounds on which equitable relief may be invoked in regard to judgments. *Johnson v. Bogdis*, 205 Ga. 535, 54 S.E.2d 620 (1949), later appeal, 207 Ga. 650, 63 S.E.2d 658 (1951).

One of the most frequently recurring forms of fraud on the part of one litigant against the other, entitling the latter to relief in equity against the judgment finally entered, is the making of some agreement or representation for the purpose of preventing an appearance or defense in the original action and reliance upon which has had the effect intended. *Johnson v. Bogdis*, 205 Ga. 535, 54 S.E.2d 620 (1949), later appeal, 207 Ga. 650, 63 S.E.2d 658 (1951).

Cited in Equitable Bldg. & Loan Ass'n v. Brady, 171 Ga. 576, 156 S.E. 222 (1930); *Equitable Bldg. & Loan Ass'n v. Brady*, 175 Ga. 43, 164 S.E. 674 (1932); *Oliver v. O'Kelley*, 48 Ga. App. 762, 173 S.E. 232

(1934); *Grimmett v. Barnwell*, 184 Ga. 461, 192 S.E. 191 (1937); *Furr v. Jordan*, 196 Ga. 862, 27 S.E.2d 861 (1943); *Beavers v. Williams*, 199 Ga. 114, 33 S.E.2d 343 (1945); *Fulmer v. Wilkins*, 201 Ga. 322, 39 S.E.2d 405 (1946); *Heath v. Jones*, 168 F.2d 460 (5th Cir. 1948); *Clark v. White*, 185 F.2d 528 (5th Cir. 1950); *Rountree v. Davis*, 90 Ga. App. 223, 82 S.E.2d 716 (1954); *Oliver v. Farmer's State Bank*, 224 Ga. 56, 159 S.E.2d 405 (1968); *Sikes v. Sikes*, 231 Ga. 105, 200 S.E.2d 259 (1973); *Holder v. Brock*, 129 Ga. App. 732, 200 S.E.2d 912 (1973); *Central Soya Co. v. Bundrick*, 234 Ga. 133, 214 S.E.2d 556 (1975).

Equitable Jurisdiction Dependent on
Adequacy of Legal Remedy

Equitable jurisdiction in cases of fraud extended only where remedy at law is deficient. — While it is true that in all cases of fraud equity has concurrent jurisdiction with the law, equity takes jurisdiction only where the operation of the general rules of law would be deficient in protecting the rights of the complaining party. *Gandy v. Robinson Co.*, 216 Ga. 190, 115 S.E.2d 341 (1960).

This general principle does not authorize a suit in equity merely to recover damages for fraud, since the aggrieved party in such a case has an adequate and complete remedy at law. *Aetna Ins. Co. v. Lunsford*, 179 Ga. 716, 177 S.E. 727 (1934).

Where it appeared that insurance company had an adequate remedy at law in a suit filed by the insured against the company claiming disability payments under the policy, a petition in equity brought by the company to cancel the contract of insurance on the ground of fraud in its procurement was properly dismissed on demurrer (now motion to dismiss). *Penn Mut. Life Ins. Co. v. Childs*, 189 Ga. 835, 7 S.E.2d 907 (1940).

Petition seeking to rescind a conditional bill of sale because of alleged fraudulent representations of the vendor as to the kind, quality, and condition of the personalty sold, to recover the portion of the purchase money paid by the vendee, and for injunction, cancellation, and accounting, in which are set up no peculiar circumstances showing a necessity of interposition by a court of equity, such as insolvency or nonresidence of the vendor, is not maintainable in equity, as the plaintiff has an adequate and complete remedy at law, nor would the fact that it was alleged that the vendor was threatening to transfer the conditional sale contract to a third person afford any ground for equitable relief,

under the facts. *Williford v. Haverty Furn. Co.*, 183 Ga. 707, 189 S.E. 521 (1937).

Pleading and Practice

Judgments of probate courts may be set aside by equity, in a direct proceeding for that purpose, on the ground that they were procured by fraud. *Johnson v. Bogdis*, 205 Ga. 535, 54 S.E.2d 620 (1949), later appeal, 207 Ga. 650, 63 S.E.2d 658 (1951).

It has been many times held that judgments of courts of ordinary (now probate courts) may be set aside by equity, in a direct proceeding for that purpose, on the ground that they were procured by fraud. *Maddox v. Wheeler*, 230 Ga. 580, 198 S.E.2d 284 (1973).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Equity, § 20. 37 Am. Jur. 2d, Fraud and Deceit, §§ 323-326.

C.J.S. — 30 C.J.S., Equity, § 48 et seq. 37 C.J.S., Fraud, § 74.

ALR. — Right of insurer to have issue of

fraud, raised in action on the policy, tried in equity, 97 ALR 572.

Reasonable expectation of payment as affecting offense under "worthless check" statutes, 9 ALR3d 719.

23-2-51. Fraud as actual or constructive.

(a) Fraud may be actual or constructive.

(b) Actual fraud consists of any kind of artifice by which another is deceived. Constructive fraud consists of any act of omission or commission, contrary to legal or equitable duty, trust, or confidence justly reposed, which is contrary to good conscience and operates to the injury of another.

(c) Actual fraud implies moral guilt; constructive fraud may be consistent with innocence. (Orig. Code 1863, § 3104; Code 1868, § 3116; Code 1873, § 3173; Code 1882, § 3173; Civil Code 1895, § 4025; Civil Code 1910, § 4622; Code 1933, § 37-702.)

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

FRAUD GENERALLY

1. IN GENERAL
2. MISREPRESENTATION GENERALLY
3. ACTUAL FRAUD
4. CONSTRUCTIVE FRAUD
5. INCEPTIVE FRAUD

PLEADING AND PRACTICE

General Consideration

A statement of fact is the foundation of fraud under this section. *Daniel v. Dalton News Co.*, 48 Ga. App. 772, 173 S.E. 727 (1934).

Fraud is not always perpetrated by willful misrepresentations. *Sapp v. ABC Credit & Inv. Co.*, 243 Ga. 151, 253 S.E.2d 82 (1979).

Actionable fraud cannot be based upon a promise as to future events; nor does actionable fraud arise from a mere failure to perform a promise. *C.P.D. Chem. Co. v. National Car Rental*, 148 Ga. App. 756, 252 S.E.2d 665 (1979).

Cited in *Mangham v. Cobb*, 160 Ga. 182, 127 S.E. 408 (1925); *Battle v. Williford*, 160 Ga. 287, 127 S.E. 762 (1925); *Lathrop v. Miller*, 164 Ga. 167, 138 S.E. 50 (1927); *Bryant v. Bush*, 165 Ga. 252, 140 S.E. 366 (1927); *Collins v. Collins*, 165 Ga. 198, 140 S.E. 501 (1927); *King Hdwe. Co. v. Ennis*, 39 Ga. App. 355, 147 S.E. 119 (1929); *Boyles v. Morgan*, 168 Ga. 804, 149 S.E. 149 (1929); *Thomas v. Couch*, 171 Ga. 602, 156 S.E. 206 (1930); *Equitable Bldg. & Loan Ass'n v. Brady*, 175 Ga. 43, 164 S.E. 674 (1932); *Morton v. Wallace*, 177 Ga. 856, 171 S.E. 720 (1933); *Dover v. Burns*, 186 Ga. 19, 196 S.E. 785 (1938); *Young v. Hirsch*, 187 Ga. 1, 199 S.E. 179 (1938); *Beavers v. Williams*, 199 Ga. 114, 33 S.E.2d 343 (1945); *McCommons v. Reid*, 201 Ga. 500, 40 S.E.2d 73 (1946); *Hogg v. Hogg*, 206 Ga. 691, 58 S.E.2d 403 (1950); *City of Dalton v. United States Fid. & Guar. Co.*, 216 Ga. 602, 118 S.E.2d 475 (1961); *Bagley v. Firestone Tire & Rubber Co.*, 104 Ga. App. 736, 123 S.E.2d 179 (1961); *Fuller v. Dillon*, 220 Ga. 36, 136 S.E.2d 733 (1964);

Tripp v. Conner, 220 Ga. 2, 136 S.E.2d 744 (1964); *Bloodworth v. Bloodworth*, 225 Ga. 379, 169 S.E.2d 150 (1969); *Walsh v. Campbell*, 130 Ga. App. 194, 202 S.E.2d 657 (1973); *Hendrix v. Scarborough*, 131 Ga. App. 342, 206 S.E.2d 42 (1974); *Thibadeau Co. v. McMillan*, 132 Ga. App. 842, 209 S.E.2d 236 (1974); *Lewis v. Citizens & S. Nat'l Bank*, 139 Ga. App. 855, 229 S.E.2d 765 (1976); *Shipman v. Horizon Corp.*, 245 Ga. 808, 267 S.E.2d 244 (1980).

Fraud Generally

1. In General

Fraud is either actual or constructive, and either constitutes legal fraud. *Jordan v. Belvin*, 57 Ga. 719, 196 S.E. 132 (1938); *Gaultney v. Windham*, 99 Ga. App. 800, 109 S.E.2d 914 (1959).

Fraud may be actual or constructive; actual fraud consists in any kind of artifice by which another is deceived, and constructive fraud consists in any act of omission or commission, contrary to legal or equitable duty, trust, or confidence justly reposed, which is contrary to good conscience and operates to the injury of another. *Brittain Bros. Co. v. Davis*, 174 Ga. 1, 161 S.E. 841 (1931).

Either actual or constructive fraud may consist in the misrepresentation of a material fact. *Gaultney v. Windham*, 99 Ga. App. 800, 109 S.E.2d 914 (1959).

Fraud is exceedingly subtle in its nature and can be accomplished by infinite means; it may be perpetrated by signs and tricks, and even silence may in some instances amount to fraud. *Sapp v. ABC Credit & Inv. Co.*, 243 Ga. 151, 253 S.E.2d 82 (1979).

Fraud cannot consist of mere broken promises, unfulfilled predictions, or erroneous conjectures as to future events. C.P.D. Chem. Co. v. National Car Rental Systems, 148 Ga. App. 756, 252 S.E.2d 665 (1979).

Constructive fraud, as well as actual fraud, voids the contract at the election of the injured party, and may authorize a rescission of a written release from liability. Southeastern Greyhound Lines v. Fisher, 72 Ga. App. 717, 34 S.E.2d 906 (1945).

While only actual fraud will authorize an ex parte rescission of a sale of personalty so as to enable the aggrieved party to sue at law, as in trover, for property that he may have delivered to the other under the contract, a sale either of realty or of personalty may be rescinded by a court for mere constructive fraud, where the other essentials of the case are established. Puckett v. Reese, 203 Ga. 716, 48 S.E.2d 297 (1948).

2. Misrepresentation Generally

Any misrepresentation intended to deceive and which does deceive is a fraud, for which a party is entitled to a remedy at law. Oliver v. O'Kelley, 48 Ga. App. 762, 173 S.E. 232 (1934); Thompson v. Wilkins, 143 Ga. App. 739, 240 S.E.2d 183 (1977).

In a suit by the seller for the purchase money of land, the defendant purchaser is entitled to plead that he was not put in possession of the premises and that the seller was guilty of false and fraudulent representations as to the existence of liens on the premises, and, upon proof of such facts, a verdict in his favor is authorized. Oliver v. O'Kelley, 48 Ga. App. 762, 173 S.E. 232 (1934).

Where the owner of land represented to the purchaser that there was no encumbrance against the premises sold, thereby inducing him to purchase it, and it was found later to be encumbered, this constituted a fraudulent representation for which relief will be given the purchaser. Oliver v. O'Kelley, 48 Ga. App. 762, 173 S.E. 232 (1934).

A misrepresentation by a director to a person purchasing stock concerning the financial condition of the corporation is actionable. Daniel v. Dalton News Co., 48 Ga. App. 772, 173 S.E. 727 (1934).

To state that a certain individual had signed contract as surety and that her signature was genuine was a misrepresentation of material existing fact, a fraudulent thing in law which would avoid the contract. W.T. Rawleigh Co. v. Kelly, 78 Ga. App. 10, 50 S.E.2d 113 (1948).

In the absence of a confidential relationship a party may not rely and act on the misrepresentations of an opposite party as to the contents of a written instrument where the party signing can read and where no artifice or fraud is practiced which prevents the party signing from reading the instrument. Robi v. Goldstein, 100 Ga. App. 606, 112 S.E.2d 165 (1959).

Misrepresentations are not actionable unless the hearer was justified in relying on them in the exercise of common prudence and diligence. Daugert v. Holland Furnace Co., 107 Ga. App. 566, 130 S.E.2d 763 (1963).

Statements as to future acts merely promissory in their nature are not actionable. Boatman v. Citizens & S. Nat'l Bank, 155 Ga. App. 848, 273 S.E.2d 190 (1980).

A misrepresentation of a present state of mind is actionable as fraud. McFarland v. Kim, 156 Ga. App. 781, 275 S.E.2d 364 (1980).

If the plaintiffs represented to the defendant that they would sign a guarantee of defendant's obligations under the lease, knowing that they had no intention of ever doing this in the future, this would not be a broken promise as to a future act but would be a misrepresentation of a present state of mind and actionable as fraud. The failure of the plaintiffs to sign such a guarantee when presented to them by the landlord is some evidence that they had no intention at any time to complete that act. McFarland v. Kim, 156 Ga. App. 781, 275 S.E.2d 364 (1980).

Misrepresentations as to a question of law cannot constitute remediable fraud, because everyone is presumed to know the law and therefore cannot in legal contemplation be deceived by erroneous statements of law, and such representations are ordinarily regarded as mere expressions of opinion. Sorrells v. Atlanta Transit Sys., 218 Ga. 623, 129 S.E.2d 846 (1963).

While a party must exercise reasonable diligence to protect himself against the fraud of another, he is not bound to exhaust all means at his command to ascertain the truth before relying upon the representations. Ordinarily the question whether the complaining party could have ascertained the falsity of the representations by proper diligence is for determination by the jury. *Gaines v. Watts*, 224 Ga. 321, 161 S.E.2d 830 (1968).

When the means of knowledge are at hand and equally available to both parties to a contract of sale, if the purchaser does not avail himself of these means, he will not be heard to say, in impeachment of the contract, that he was deceived by the representations of the seller. *Lorick v. Na-Churs Plant Food Co.*, 150 Ga. App. 209, 257 S.E.2d 332 (1979).

3. Actual Fraud

Actual fraud predicated on intent. — Whether a fraud is actual depends on whether the false representation was made with the purpose and intent to deceive. *Gaultney v. Windham*, 99 Ga. App. 800, 109 S.E.2d 914 (1959).

In any suit sounding in tort for damages on account of actual fraud, the gist of the action is the purpose and design to deceive. *Gaultney v. Windham*, 99 Ga. App. 800, 109 S.E.2d 914 (1959).

Actual fraud involves moral guilt, since there must be an intentional purpose to deceive. *Turner v. Ware*, 2 Ga. App. 57, 58 S.E. 310 (1907); *Gaultney v. Windham*, 99 Ga. App. 800, 109 S.E.2d 914 (1959).

A material misrepresentation constituting actual fraud may give rise to an independent action in tort for deceit, to recover for damage thus occasioned. In such a suit it is necessary to show, not only that a material misrepresentation was made for the purpose of inducing the plaintiff to act, that he had a right to act, and that he did act thereon to his injury, but it must be shown that such representation was willfully and knowingly false, or what the law regards as the equivalent of knowledge, a reckless or fraudulent representation about that which the party pretends to know, but about which he knows that he does not know, and by which false pretense his purpose and intent is to deceive.

Gaultney v. Windham, 99 Ga. App. 800, 109 S.E.2d 914 (1959).

Essential elements. — In an independent affirmative action for fraud and deceit, which must be predicated upon actual fraud, the plaintiff must allege and prove the following essential ingredients: (1) the defendant made the representations; (2) at the time he knew they were false (or what the law regards as the equivalent of knowledge, a fraudulent or reckless representation of facts as true, which the party may not know to be false, if intended to deceive); (3) the defendant made the representations with the intention and purpose of deceiving the plaintiff; (4) the plaintiff relied upon such representations; (5) the plaintiff sustained the alleged loss and damage as the proximate result of their having been made; and (6) (an element frequently omitted in the cases enumerating the essentials), want of knowledge by the party alleged to have been deceived that the representation was false. It is essential that the plaintiff was deceived and there can be no deceit if the plaintiff knows that the representations upon which he is alleged to have acted were false. *Gaultney v. Windham*, 99 Ga. App. 800, 109 S.E.2d 914 (1959); *Romey v. Willett Lincoln-Mercury, Inc.*, 136 Ga. App. 67, 220 S.E.2d 74 (1975); *C.P.D. Chem. Co. v. National Car Rental Systems*, 148 Ga. App. 756, 252 S.E.2d 665 (1979).

To allege fraud, the claimant must contend the defendant knowingly made a false representation with the intent and purpose of deceiving the plaintiff. Additionally, there must be a reliance on such representations and a loss sustained thereby. The misrepresentations must also relate to a preexisting or present fact and not statements or representations involving future conduct. *Cone Mills Corp. v. A.G. Estes, Inc.*, 377 F. Supp. 222 (N.D. Ga. 1974).

A promise to take title to the property, farm it, pay off the debt existing thereon, and then to reconvey it to the plaintiff, made as an inducement or consideration for the execution of a deed by plaintiff, does not constitute fraud, so as to authorize cancellation of the deed, or a decree of specific performance of the agreement to convey, unless the promise was made with

the present intention not to comply with it. A mere failure to comply with the promise would be insufficient to establish such fraudulent intent. *Dixon v. Dixon*, 211 Ga. 557, 87 S.E.2d 369 (1955).

Actual fraud is not essential to support an action in equity to rescind a contract for fraud, or to a plea of fraud to a suit on a contract; innocently made material misrepresentations which the opposite party has a right to act on, and does act on to his injury, and which amount only to constructive fraud, being sufficient in these last two instances. By a parity of reasoning, actual fraud is not essential to the setting aside of an accord and satisfaction. *Jordan v. Belvin*, 57 Ga. 719, 196 S.E. 132 (1938).

4. Constructive Fraud

Constructive fraud does not involve moral guilt, since it is the act itself, as taken in connection with the relationship of the parties, and not the guilty purpose or intent, which constitutes constructive fraud. *Gaultney v. Windham*, 99 Ga. App. 800, 109 S.E.2d 914 (1959).

Innocent misrepresentations, when made by one charged with a special duty to the opposite party to know and to impart the truth, under the statutes and decisions of this state cannot amount to anything more than constructive fraud, and, as such, are not creative of any independent right of action for damages in tort in favor of the injured party; but they may support an action in equity to rescind a contract so induced or be pleaded in defense to a suit on a contract thus procured, or may, it might seem, under the doctrine of estoppel, be employed in support of an action founded on the contract itself. *Gaultney v. Windham*, 99 Ga. App. 800, 109 S.E.2d 914 (1959).

If a person having legal title to land, which fact he does not know but has convenient means of knowing, and after a lapse of 27 years, during which time he was under no legal disability, he still has not learned the fact of his interest in the land, and in those circumstances he induces one to buy the land from a third person by representations that the land is the property of such third person, his misrepresentations to the purchaser innocently made, coupled with his delay in ascertaining the truth, will

amount to constructive fraud, and they may be pleaded as an estoppel by the purchaser on the faith of the title of his vendor. *Lanier v. Bryant*, 180 Ga. 409, 179 S.E. 346 (1935).

Where insured furnished false evidence which was relied upon by the insurance company in reinstating insurance policies he was guilty of fraud in law which would avoid the policy, whether he was in good or bad faith and whether he intended to deceive or not. *New York Life Ins. Co. v. Odom*, 93 F.2d 641 (5th Cir. 1937), cert. denied, 304 U.S. 566, 58 S. Ct. 948, 82 L. Ed. 1532 (1938).

Where insured, in applying for reinstatement of life policies, furnishes false evidence which is relied on by the insurance company, he is guilty of fraud in law which avoids the policy whether he acts in good or bad faith and whether he intends to deceive or not. *Life & Cas. Ins. Co. v. Davis*, 62 Ga. App. 832, 10 S.E.2d 129 (1940).

5. Inceptive Fraud

When the failure to perform the promised act is coupled with the present intention not to perform, fraud in the legal sense is present; this is known as inceptive fraud, and is sufficient to support an action for cancellation of a written instrument. *Cone Mills Corp. v. A.G. Estes, Inc.*, 377 F. Supp. 222 (N.D. Ga. 1974).

Pleading and Practice

It is error to charge the jury concerning fraud when no harm was done the defendant nor was the defendant deceived or injured in any way as the result of the plaintiff attempting to write in an endorsement on a note which had actually been transferred to it but had not been properly endorsed. *Associates Dist. Corp. v. Brantley*, 102 Ga. App. 751, 117 S.E.2d 916 (1960).

Diligence is question for jury. — It is the province of the jury to pass upon all the circumstances of the alleged fraud, and to determine whether or not the party defrauded exercised diligence in discovering the falsity of the misrepresentations. *Daniel v. Dalton News Co.*, 48 Ga. App. 772, 173 S.E. 727 (1934); *Daugert v. Holland Furnace Co.*, 107 Ga. App. 566, 130 S.E.2d 763 (1963).

The purchase by an administrator at his own sale is not in itself fraud. *Gormley v. Askew*, 177 Ga. 554, 170 S.E. 674 (1933).

Fraud and undue influence can rarely be established by direct proof, accordingly, both may be proved by indirect evidence and by proof of facts from which they may be inferred. *Daniel v. Etheredge*,

198 Ga. 191, 31 S.E.2d 181 (1944).

Fraud and undue influence are not equivalent terms, but undue influence may be a species of fraud or it may exist without any positive fraud. *Daniel v. Etheredge*, 198 Ga. 191, 31 S.E.2d 181 (1944).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Equity, § 20. 37 Am. Jur. 2d, Fraud and Deceit, § 4.

C.J.S. — 30 C.J.S., Equity, § 48 et seq. 37 C.J.S., Fraud, § 2.

ALR. — Remedy of contractor, who has partially performed before discovering fraud, as to character or amount of work, 2 ALR 1396.

Presence of noxious weeds as ground for rescission of contract for purchase of land, 2 ALR 1511.

Misrepresentation as regards validity of conveyance or transfer of property as fraud, 9 ALR 1051.

False representations in business transaction as within statute relating to "confidence game," 9 ALR 1527; 56 ALR 727.

Fraud or perjury in misrepresenting status or relationship essential to the judgment as ground of relief from, or injunction against, judgment, 49 ALR 1219.

May offense of obtaining money or property by false pretenses or confidence game be predicated on obtaining loan or renewal thereof, 52 ALR 1167.

Misrepresentation or mistake as to whether corporate stock is assessable as one of law or of fact, 65 ALR 1256.

Examination of real property by purchaser before entering into contract as precluding rescission on ground of falsity of representations, 70 ALR 942.

Misrepresentation as to market price or market value as fraud, 71 ALR 622.

Fraud: necessity for knowledge of falsity of representation as to value, inducing subscription to or purchase of corporate stock, or other securities, 73 ALR 1120.

Civil liability of bank officer or director permitting deposit after insolvency of bank, 87 ALR 1402.

Promises and statements as to future events as fraud, 91 ALR 1295; 125 ALR 879.

Application of principal that false representations made to one person with intention that another may act thereon are actionable in favor of latter, 91 ALR 1363.

Illegal or fraudulent intent of prosecuting witness or person defrauded as defense in prosecution based on false representations, 95 ALR 1249; 128 ALR 1520.

Financial statement by borrower as basis of loan or extension of credit, 104 ALR 921.

Action for fraud or deceit predicated upon oral contract within the statute of frauds or the transaction of which the oral contract was a part, 104 ALR 1490.

Concealment of fact that one of parties to land contract was acting for third person, or misrepresentation as to identity of party for whom he was acting as reason for denying specific performance, or for rescission of contract, 121 ALR 1162.

Fraud predicated upon misrepresentation by grantee or transferee regarding grantor's or transferrer's title, 136 ALR 1299.

What amounts to fraud on contractor, sustaining rescission or action for damages under building or construction contract, 166 ALR 938.

Crime of false pretenses as predicable upon present intention not to comply with promise or statement as to future act, 168 ALR 833.

Doctrine of constructive trust or unjust enrichment as applicable between owner and one who fraudulently procures tax certificates, 175 ALR 700.

Real estate broker's right to commission where purchaser refuses to go through

with executory contract because of reckless misrepresentation made to him by broker respecting property, 9 ALR2d 504.

Misrepresentation as to loan commitment on real estate as ground of action, counterclaim, or rescission by vendee, 14 ALR2d 1347.

Misrepresentation by one other than insurance agent as to coverage, exclusion, or legal effect of insurance policy, as actionable, 29 ALR2d 213.

Misrepresentation by lessor, in negotiations for lease, as to offers of rental received from third persons, as actionable fraud, 30 ALR2d 923.

Avoidance of release of personal injury claims on ground of fraud or mistake as to the extent or nature of injuries, 71 ALR2d 82.

Liability of vendor of structure for failure to disclose that it was built on filled ground, 80 ALR2d 1453.

Reasonable expectation of payment as affecting offense under "worthless check" statutes, 9 ALR3d 719.

Employer's misrepresentations as to employee's or agent's future earnings as

actionable fraud, 16 ALR3d 1311.

Application of "bad check" statute with respect to postdated checks, 52 ALR3d 464.

Consumer class actions based on fraud or misrepresentation, 53 ALR3d 534.

Promissory estoppel as basis for avoidance of statute of frauds, 56 ALR3d 1037.

Automobile or motorcycle as necessary for infant, 56 ALR3d 1335.

Automobile insurance: concealment or nondisclosure of physical defects or conditions as avoiding coverage, 72 ALR3d 804.

Spouse's acceptance or retention of benefits of other spouse's fraudulent act as ratification of transaction, 82 ALR3d 625.

Fraud predicated on vendor's misrepresentation or concealment of danger or possibility of flooding or other unfavorable water conditions, 90 ALR3d 568.

Action based upon reconveyance, upon promise of reconciliation, of property realized from divorce award or settlement, 99 ALR3d 1248.

23-2-52. Misrepresentation as legal fraud.

Misrepresentation of a material fact, made willfully to deceive or recklessly without knowledge and acted on by the opposite party or made innocently and mistakenly and acted on by the opposite party, constitutes legal fraud. (Orig. Code 1863, § 3105; Code 1868, § 3117; Code 1873, § 3174; Code 1882, § 3174; Civil Code 1895, § 4026; Civil Code 1910, § 4623; Code 1933, § 37-703.)

Law reviews. —	For article, "Consumer	Misrepresentations," see 20 <i>Mercer L. Rev.</i>
Protection	Against	Sellers
		414 (1969).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
REMEDIES

1. IN GENERAL
2. RESCISSION
3. DAMAGES

ORDINARY DILIGENCE
PLEADING AND PRACTICE

General Consideration

Fraud is either actual or constructive, and either constitutes legal fraud. *Jordan v. Belvin*, 57 Ga. 719, 196 S.E. 132 (1938); *Southeastern Greyhound Lines v. Fisher*, 72 Ga. App. 717, 34 S.E.2d 906 (1945).

Concealment by defendant of the financial status of the corporation when it was in fact a losing business facing lawsuits coupled with delivery of nonvoting stock instead of the promised voting stock constituted legal fraud when it was proven to the satisfaction of the jury. *Adkins v. Lee*, 127 Ga. App. 261, 193 S.E.2d 252 (1972).

Misrepresentation of a material fact, if made by mistake, and innocently, and acted on by the opposite party to his injury, constitutes constructive fraud under this section. *Southeastern Greyhound Lines v. Fisher*, 72 Ga. App. 717, 34 S.E.2d 906 (1945).

In the case of fire and life insurance applications a misrepresentation is material if the misrepresentation changes the character, nature or extent of the risk. *State Farm Mut. Ins. Co. v. Anderson*, 107 Ga. App. 348, 130 S.E.2d 144, cert. dismissed, 219 Ga. 211, 132 S.E.2d 556 (1963).

Where it is shown that a material statement in an application is false which was known to the insured at the time he made it and it was made with a view toward obtaining the insurance, with the company having no knowledge of its falsity, where the company acted upon it to its injury, the law will conclusively presume an intent to deceive, and a case of actual fraud will be made out. *State Farm Mut. Auto. Ins. Co. v. Anderson*, 107 Ga. App. 348, 130 S.E.2d 144, cert. dismissed, 219 Ga. 211, 132 S.E.2d 556 (1963).

Any misrepresentation intended to deceive and which does deceive is a fraud, for which a party is entitled to a remedy at law. *Adkins v. Lee*, 127 Ga. App. 261, 193 S.E.2d 252 (1972).

In order for a fraud to be actionable, the representation relied on must be more than a promise which is void or unenforceable. *Barrett v. Independent Order of Foresters*, 625 F.2d 73 (5th Cir. 1980).

Cited in *Hixon v. Hinkle*, 156 Ga. 341, 118 S.E. 874 (1923); *Mangham v. Cobb*, 160 Ga. 182, 127 S.E. 408 (1925); *Nix v. Citizens Bank*, 35 Ga. App. 55, 132 S.E. 249 (1926); *Penn Mut. Life Ins. Co. v. Taggart*, 38 Ga. App. 509, 144 S.E. 400 (1928); *Hamlin v. Johns*, 166 Ga. 880, 144 S.E. 659 (1928); *Lancaster v. Neal*, 41 Ga. App. 721, 154 S.E. 386 (1930); *Equitable Bldg. & Loan Ass'n v. Brady*, 175 Ga. 43, 164 S.E. 674 (1932); *Wall v. Wall*, 176 Ga. 757, 168 S.E. 893 (1933); *Roper v. White*, 178 Ga. 293, 173 S.E. 115 (1934); *Dover v. Burns*, 186 Ga. 19, 196 S.E. 785 (1938); *Crowell v. Brim*, 191 Ga. 288, 12 S.E.2d 585 (1940); *Norwood v. Norwood*, 207 Ga. 148, 60 S.E.2d 449 (1950); *Patterson v. Correll*, 92 Ga. App. 214, 88 S.E.2d 327 (1955); *Sorrells v. Atlanta Transit Sys.*, 218 Ga. 623, 129 S.E.2d 846 (1963); *Walsh v. Campbell*, 130 Ga. App. 194, 202 S.E.2d 657 (1973); *Thibadeau Co. v. McMillan*, 132 Ga. App. 842, 209 S.E.2d 236 (1974); *City of Jesup v. Spivey*, 133 Ga. App. 403, 210 S.E.2d 859 (1974); *Clements v. Warner Supply Co.*, 235 Ga. 612, 221 S.E.2d 35 (1975); *North Peachtree I-285 Properties, Ltd. v. Hicks*, 136 Ga. App. 426, 221 S.E.2d 607 (1975).

Remedies

1. In General

Election of remedies. — When a vendee is induced to enter into a contract for the purchase of land by the fraud of the vendor, when the former discovers the fraud he has an election of remedies. One of such remedies is to rescind the contract, and another is to affirm the contract and sue for damages for the fraud. *Price v. Mitchell*, 154 Ga. App. 523, 268 S.E.2d 743 (1980).

2. Rescission

Rescission of transaction based on misrepresentation authorized. — Material misrepresentation, made for the purpose of inducing another to execute a promissory note, will authorize the maker, after executing the note, to rescind the transaction on discovery, of the fraud, if he relied upon the representation and was induced thereby to execute the note. *Thompson v. Wilkins*, 143 Ga. App. 739, 240 S.E.2d 183 (1977).

A promise to do a certain thing for the benefit of the promisee, made to induce his entrance into a contract, the promisee earnestly believing that he would receive the benefits consequent upon the fulfillment of the promise, when at the time of making the promise there was no intention on the part of the promisor to fulfill it, but, on the contrary, the promise was made with intent not to fulfill it and was uttered as a mere scheme or device to defraud, is such a fraud as will void any contract induced thereby. A promise thus fraudulently made will authorize rescission of a written instrument purporting to be a contract. *Price v. Mitchell*, 154 Ga. App. 523, 268 S.E.2d 743 (1980).

Constructive fraud, as well as actual fraud, voids the contract at the election of the injured party, and may authorize a rescission of a written release from liability. *Southeastern Greyhound Lines v. Fisher*, 72 Ga. App. 717, 34 S.E.2d 906 (1945).

A material representation falsely made by a vendor to a vendee to induce a sale, and made with knowledge of its falsity and acted upon to the vendee's injury, amounts to actual fraud, and will void a contract, and authorize rescission by the vendee if he

acts promptly after discovery of the fraud and restores or offers to restore whatever of value he has received by virtue of the contract. *Price v. Mitchell*, 154 Ga. App. 523, 268 S.E.2d 743 (1980).

3. Damages

Damages generally. — Misrepresentation of a material fact, made by one of the parties to a contract, though made by mistake, and innocently, if acted on by the opposite party, constitutes legal fraud, and the party injured in consequence thereof may set up the damages thus arising in defense to an action upon the contract. *Morton v. W.T. Tharpe & Co.*, 41 Ga. App. 788, 154 S.E. 716 (1930).

Where a vendor agrees to sell a designated tract of land to another and points out to the latter its boundaries and where such boundaries include lands to which the vendor has no title, in consequence of which the purchaser loses the same, the purchaser can setoff at law the value of the portion of the land so lost, against the purchase money whether the representations were designedly made by the vendor to deceive the purchaser, or were innocently made. *Bonner v. Cotton*, 223 Ga. 843, 159 S.E.2d 61 (1968).

Where there is a material misrepresentation, a policy (of insurance) may be voided. *State Farm Mut. Ins. Co. v. Anderson*, 107 Ga. App. 348, 130 S.E.2d 144, cert. dismissed, 219 Ga. 211, 132 S.E.2d 556 (1963).

Where insured furnished false evidence which was relied upon by the insurance company in reinstating insurance policies he was guilty of fraud in law which would void the policy, whether he was in good or bad faith and whether he intended to deceive or not. *New York Life Ins. Co. v. Odom*, 93 F.2d 641 (5th Cir. 1937), cert. denied, 304 U.S. 566, 58 S. Ct. 948, 82 L. Ed. 1532 (1938).

Ordinary Diligence

Ordinary diligence required of party claiming injury. — One cannot claim to be defrauded by the false representation of another where, by the exercise of ordinary diligence, such person could have discovered the falsity of the representations before acting thereon. *Barrett*

v. Independent Order of Foresters, 625 F.2d 73 (5th Cir. 1980).

An equitable action to cancel a deed on the ground of fraud, which clearly shows that the complainant failed to use even slight diligence to discover the fraud, fails to allege a cause of action. Courts of equity will not grant relief to one whose long delay renders the ascertainment of the truth difficult, though no legal limitation bars the action. *Whitfield v. Whitfield*, 204 Ga. 64, 48 S.E.2d 852 (1948).

Blind reliance exists where it cannot be said that the purchase originated in fraud so much as in the carelessness of the purchaser to exercise ordinary care for his own interest. *Adkins v. Lee*, 127 Ga. App. 261, 193 S.E.2d 252 (1972).

While the doctrine of caveat emptor would charge the purchaser with looking out for the title which the seller had to the

tract offered for sale as his, it would not charge him with looking out for the boundaries of that tract when the seller undertook to locate and point them out, thus professing to know them sufficiently to enable them to furnish this information to purchasers instead of leaving the latter to their own resources in acquiring the information. *Bonner v. Cotton*, 223 Ga. 843, 159 S.E.2d 61 (1968).

Pleading and Practice

Questions of fraud, bad faith and materiality of misrepresentation are ordinarily for a jury. *Adkins v. Lee*, 127 Ga. App. 261, 193 S.E.2d 252 (1972).

A contention that fraud is a personal defense or plea, and could be made only by the party deceived, is without merit. *Houston v. Horton*, 202 Ga. 307, 43 S.E.2d 90 (1947).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Equity, § 20. 37 Am. Jur. 2d, Fraud and Deceit, § 247 et seq.

C.J.S. — 30 C.J.S., Equity, § 48. 37 C.J.S., Fraud, §§ 3, 19 et seq.

ALR. — Misrepresentation as regards validity of conveyance or transfer of property as fraud, 9 ALR 1051.

False representations in business transaction as within statute relating to "confidence game," 9 ALR 1527; 56 ALR 727.

Seller's concealment of ownership of other property inducing exclusion of same from contract as actionable fraud, 26 ALR 990.

Promises and statements as to future events as fraud, 51 ALR 46; 68 ALR 635; 91 ALR 1295; 125 ALR 879.

Misrepresentation as to market price or market value as fraud, 71 ALR 622.

Employer's misrepresentations as to

employee's or agent's future earnings as actionable fraud, 16 ALR3d 1311.

Duty of vendor of real estate to give purchaser information as to termite infestation, 22 ALR3d 972.

Purchaser's misrepresentations as to intended use of real property as ground for vendor's equitable relief from contract and deed, 35 ALR3d 1369.

Consumer class actions based on fraud or misrepresentation, 53 ALR3d 534.

Modern status of rules regarding materiality and effect of false statement by insurance applicant as to previous insurance cancellations or rejections, 66 ALR3d 749.

Fraud predicated on vendor's misrepresentation or concealment of danger of possibility of flooding or other unfavorable water conditions, 90 ALR3d 568.

23-2-53. Suppression of fact as fraud.

Suppression of a material fact which a party is under an obligation to communicate constitutes fraud. The obligation to communicate may arise from the confidential relations of the parties or from the particular cir-

cumstances of the case. (Orig. Code 1863, § 3106; Code 1868, § 3118; Code 1873, § 3175; Code 1882, § 3175; Civil Code 1895, § 4027; Civil Code 1910, § 4624; Code 1933, § 37-704.)

Law reviews. — For note as to recovery by home buyer for fraud in passive concealment by vendor, see 29 Mercer L. Rev. 323 (1977).

JUDICIAL DECISIONS

Under this section, suppression of a fact material to be known, and which the party is under an obligation to communicate, constitutes fraud and the obligation to communicate may arise from the particular circumstances of the case. *Brittain Bros. Co. v. Davis*, 174 Ga. 1, 161 S.E. 841 (1931).

Suppression of the truth is not a fraud unless used as a means of deceiving another; no man is compelled to break silence and speak, unless there is an obligation resting upon him to speak. *Georgia Real Estate Comm'n v. Brown*, 152 Ga. App. 323, 262 S.E.2d 596 (1979).

Suppression of the truth constitutes fraud where there is an intentional concealment of a fact for the purpose of obtaining an advantage or a benefit. *Georgia Real Estate Comm'n v. Brown*, 152 Ga. App. 323, 262 S.E.2d 596 (1979).

Where insured furnished false evidence which was relied upon by the insurance company in reinstating insurance policies he was guilty of fraud in law which would avoid the policy, whether he was in good or bad faith and whether he intended to deceive or not. *New York Life Ins. Co. v. Odom*, 93 F.2d 641 (5th Cir. 1937), cert. denied, 304 U.S. 566, 58 S. Ct. 948, 82 L. Ed. 1532 (1938); *Life & Cas. Ins. Co. v. Davis*, 62 Ga. App. 832, 10 S.E.2d 129 (1940).

Where plaintiff, a woman so limited in education that she could not read and understand the meaning and effect of the instrument which she signed, surrendered, upon request of the manager of defendant insurance company, policy in which she was named beneficiary, premium receipt book and record of payments on the policy sued on, and was presented for signature and signed, a receipt or release from liability in consideration of the payment to her of \$3.30, whereas the policy provided for

payment of \$51.75 upon death of the insured, it was a fraud upon plaintiff, under the circumstances, not to disclose to her the contents of the paper which defendant, through its manager requested her to sign. *Industrial Life & Health Ins. Co. v. Johnson*, 62 Ga. App. 630, 9 S.E.2d 121 (1940).

In an action by a purchaser to rescind a contract for the purchase of real estate on the ground of the fraudulent concealment of a material fact, where the allegations of fact were insufficient to show actual fraud, in that there was no duty to communicate the material fact in question, which the purchaser could have discovered by exercising ordinary care, and there was no misrepresentations, no cause of action was stated. *Kirven v. Blackett*, 208 Ga. 178, 65 S.E.2d 791 (1951).

This section expressly goes beyond the strict fiduciary relations of the parties. *Cochran v. Murrah*, 235 Ga. 304, 219 S.E.2d 421 (1975).

Where persons sustain towards another a relation of trust and confidence, their silence when they ought to speak, or their failure to disclose what they ought to disclose, is so much a fraud in law as an actual affirmative false representation; mere silence on their part as to a cause, the facts giving rise to which it is their duty to disclose, amounts to a fraudulent concealment. *Georgia Real Estate Comm'n v. Brown*, 152 Ga. App. 323, 262 S.E.2d 596 (1979).

Cited in *Mangham v. Cobb*, 160 Ga. 482, 127 S.E. 408 (1925); *Information Buying Co. v. Miller*, 173 Ga. 786, 161 S.E. 617 (1931); *Floyd v. Boss*, 174 Ga. 544, 163 S.E. 606 (1932); *Morton v. Wallace*, 177 Ga. 856, 171 S.E. 720 (1933); *Blount v. Dean*, 187 Ga. 494, 1 S.E.2d 653 (1939); *Patterson-Pope Motor Co. v. Ford Motor*

Co., 66 Ga. App. 41, 16 S.E.2d 877 (1941); Jones v. Hogans, 197 Ga. 404, 29 S.E.2d 568 (1944); Thompson v. Thompson, 203 Ga. 128, 45 S.E.2d 632 (1947); Whitfield v. Whitfield, 204 Ga. 64, 48 S.E.2d 852 (1948); Westbrook v. Beusse, 79 Ga. App. 654, 54 S.E.2d 693 (1949); Fuller v. Dillon,

220 Ga. 36, 136 S.E.2d 733 (1964); Hendrix v. Scarborough, 131 Ga. App. 342, 206 S.E.2d 42 (1974); Wilhite v. Mays, 239 Ga. 31, 235 S.E.2d 532 (1977); Gellis v. B.L.I. Constr. Co., 148 Ga. App. 527, 251 S.E.2d 800 (1978).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Equity, § 20. 37 Am. Jur. 2d, Fraud and Deceit, § 12.

C.J.S. — 30 C.J.S., Equity, § 48. 37 C.J.S., Fraud, § 15.

ALR. — Obligor's concealment of facts or evasive answers as fraud against surety, 8 ALR 1485.

Seller's concealment of ownership of other property inducing exclusion of same from contract as actionable fraud, 26 ALR 990.

Duty of vendor of real property to disclose to purchaser condition of building thereon which affects health or safety of persons using same, 141 ALR 967.

What amounts to fraud on contractor, sustaining rescission or action for damages

under building or construction contract, 166 ALR 938.

Liability of vendor of structure for failure to disclose that it was built on filled ground, 80 ALR2d 1453.

Automobile insurance: concealment or nondisclosure of physical defects or conditions as avoiding coverage, 72 ALR2d 804.

Public contracts: duty of public authority to disclose contract or information, allegedly in its possession, affecting cost or feasibility of project, 86 ALR3d 182.

Fraud predicated on vendor's misrepresentation or concealment of danger or possibility of flooding or other unfavorable water conditions, 90 ALR3d 568.

23-2-54. Surprise as a form of fraud.

Anything which happens without the agency or fault of the party affected by it, tending to disturb and confuse his judgment or to mislead him, of which the opposite party takes an undue advantage, is in equity a surprise and is a form of fraud for which relief is granted. (Orig. Code 1863, § 3111; Code 1868, § 3123; Code 1873, § 3180; Code 1882, § 3180; Civil Code 1895, § 4034; Civil Code 1910, § 4631; Code 1933, § 37-711.)

JUDICIAL DECISIONS

Cited in Bentley v. Barlow, 178 Ga. 618, 173 S.E. 707 (1934); Jackson v. Jackson, 202 Ga. 634, 44 S.E.2d 250 (1947); Puckett

v. Reese, 203 Ga. 716, 48 S.E.2d 297 (1948).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Equity, § 20. 37 Am. Jur. 2d, Fraud and Deceit, § 23.

C.J.S. — 30 C.J.S., Equity, §§ 45, 48.

23-2-55. Use of similar trademarks, etc.

Any attempt to encroach upon the business of a trader or other person by the use of similar trademarks, names, or devices, with the intention of deceiving and misleading the public, is a fraud for which equity will grant relief. (Orig. Code 1863, § 3112; Code 1868, § 3124; Code 1873, § 3181; Code 1882, § 3181; Civil Code 1895, § 4035; Civil Code 1910, § 4632; Code 1933, § 37-712.)

Cross references. — As to registration and use of trademarks and service marks generally, see § 10-1-440.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

PRIOR USE

1. TRADE NAME
2. COLOR

UNFAIR COMPETITION

1. IN GENERAL
2. CONFUSING SIMILARITY
3. PROOF

- A. IN GENERAL
- B. "PASSING OFF" RULE
- C. INTENT TO DECEIVE

General Consideration

Construction of section. — This section is remedial in nature, is designed for the suppression of fraud, and should be liberally construed. *Kay Jewelry Co. v. Kapiloff*, 204 Ga. 209, 49 S.E.2d 19 (1948).

Application of section. — In place of an affirmative showing of specific intent, Georgia courts will apply this section when it is shown that: (1) the defendant was put on notice or had knowledge of the plaintiff's trade name and (2) the similarity in names is likely to confuse or mislead the public. *Thompson v. Alpine Motor Lodge, Inc.*, 296 F.2d 497 (5th Cir. 1961).

Cited in *Gordy v. Dunwody*, 209 Ga. 627, 74 S.E.2d 886 (1953); *East Ga. Motor Club v. AAA Fin. Co.*, 212 Ga. 408, 93 S.E.2d 337 (1956); *Royal v. Royal Poultry Co.*, 213 Ga. 813, 102 S.E.2d 44 (1958); *Pearl Optical, Inc. v. Pearle Optical of Ga., Inc.*, 218 Ga. 701, 130 S.E.2d 223 (1963); *Multiple Listing Serv. v. Metropolitan Multi-List*, 225 Ga. 129, 166 S.E.2d 356 (1969); *White's Wig Imports v. Wigmaster's Import Co.*, 226 Ga. 779, 177 S.E.2d 678 (1970); *Tri-State Culvert Mfg., Inc. v. Tri-State Drainage Prods., Inc.*, 236 Ga. 157, 223 S.E.2d 202 (1976); *Rolls-Royce Motors, Ltd. v. A & A Fiberglass, Inc.*, 428 F. Supp. 689 (N.D. Ga.

1976); Robert B. Vance & Assocs. v. Baronet Corp., 487 F. Supp. 790 (N.D. Ga. 1979); Original Appalachian Artworks, Inc. v. Toy Loft, Inc., 489 F. Supp. 174 (N.D. Ga. 1980).

Prior Use

1. Trade Name

Effect of prior use of trade name. — A person, by long and exclusive use, may acquire a trade name; and when thus acquired, such trade name is as much descriptive of the manufacturer or producer as is his own name, and the infringement of such trade name of an individual will be enjoined by a court of equity when a proper case is made. *Womble v. Parker*, 208 Ga. 378, 67 S.E.2d 133 (1951).

While generic names, geographical names, and names composed of words which are merely descriptive are incapable of exclusive appropriation, words or names which have a primary meaning of their own, such as words descriptive of the goods, service, or place where they are made, or the name of the maker, may nevertheless, by long use in connection with the business of the particular trade, come to be understood by the public as designating the goods, service, or business of a particular trader. *Multiple Listing Serv., Inc. v. Metropolitan Multi-List, Inc.*, 223 Ga. 837, 159 S.E.2d 52 (1968), later appeal, 225 Ga. 147, 166 S.E.2d 356 (1969).

Knowledge of prior use of trade name raises presumption of fraud. — When a person knows of a trade name used by another person, and, notwithstanding this knowledge, uses a similar name in his own business operations, the courts will presume that he has encroached upon the name of the other intentionally and fraudulently. *Womble v. Parker*, 208 Ga. 378, 67 S.E.2d 133 (1951); *Thompson v. Alpine Motor Lodge, Inc.*, 296 F.2d 497 (5th Cir. 1961).

2. Color

Effect of prior use of particular color. — While the color of merchandise or its wrapper or container may be one of the important indicia of a fraudulent purpose, if accompanied by other confusing factors such as size, shape, name, printing, or

design in the make-up of the article, yet color alone, except possibly where some peculiar and distinctive combination of colors is employed, is not sufficient to establish fraudulent intent, since no one is permitted from the mere prior use of such an all-belongs thing as a color to obtain a monopoly in its use for any particular purpose. *Seybold Baking Co. v. Derst Baking Co.*, 196 Ga. 391, 26 S.E.2d 536 (1943).

Testimony of defendant's manager, that he was forced to discontinue less expensive white waxed paper and use more costly "tango" colored cellophane wrapper for his whole wheat bread in order to meet the competition of the plaintiff, could not be taken to establish a fraudulent purpose as a matter of fact, when the act itself did not so indicate, where he also testified that cellophane was a more desirable and more attractive wrapper, and that the color was a more suitable and appropriate transparent wrapper for the brown bread, and where the product was without any other similarities as to the plainly printed labels both inside and outside the wrapper, the ones outside being strikingly different in color. *Seybold Baking Co. v. Derst Baking Co.*, 196 Ga. 391, 26 S.E.2d 536 (1943).

Unfair Competition

1. In General

The general purpose of the law controlling trade names and unfair competition is the prevention of fraudulent interference with rights of the lawful holder of a trade name and protection of the public from imposition. *Thompson v. Alpine Motor Lodge, Inc.*, 296 F.2d 497 (5th Cir. 1961).

The basic principle of the law of unfair competition is that no one has a right to dress up his goods or business or otherwise represent the same in such a manner as to deceive an intending purchaser and induce him to believe he is buying the goods of another, and that no one has the right to avail himself of another's favorable reputation in order to sell his own goods. *Thompson v. Alpine Motor Lodge, Inc.*, 296 F.2d 497 (5th Cir. 1961).

The good will and reputation of a business is as much an asset as its physical

properties, and it may as well be the subject of a fraudulent encroachment by an infringer. *Kay Jewelry Co. v. Kapiloff*, 204 Ga. 209, 49 S.E.2d 19 (1948).

An encroachment on the business of another may be made without direct market competition. *Gordy v. Dunwoody*, 209 Ga. 627, 74 S.E.2d 886 (1953), later appeal, 210 Ga. 810, 83 S.E.2d 7 (1954).

The words "encroach upon the business of a trader" cannot be said to limit the equitable relief available under this section to those in direct and actual market competition with an alleged infringer or to those cases where it is shown that there has been an actual diversion of trade from one business to another. *Kay Jewelry Co. v. Kapiloff*, 204 Ga. 209, 49 S.E.2d 19 (1948).

2. Confusing Similarity

Similarity must confuse the public. — Although the rights in a trade name are exclusive within certain geographical limits, this section does not create rights good against anyone, anywhere. The outer limits are set by the requirement that the plaintiff must show a similarity that is confusing to the public. *Thompson v. Alpine Motor Lodge, Inc.*, 296 F.2d 497 (5th Cir. 1961).

While geographical names and words which are merely descriptive are not generally the subject of exclusive appropriation as trade-marks or trade-names, such names and words when used so long and exclusively by a trader, manufacturer, or producer that they are generally understood to designate his business or merchandise, may acquire a secondary signification or meaning indicative not only of the place of manufacture, but of the name of the manufacturer or producer, or of the character of the product, so that the name or title thus employed, including the geographical name and descriptive words, may be the subject of protection against unfair competition in trade, and authorize equity to enjoin a newcomer competitor from the appropriation and use of a trade-name or trade-mark bearing such resemblances to those of the pioneer as to be likely to produce uncertainty and confusion, and to pass off the goods or business of one as those of the other. *Womble v. Parker*, 208 Ga. 378, 67 S.E.2d 133 (1951).

Unless it appears that there is or will probably be a deception of ordinary buyers and the general public into thinking that the goods or business of one is the business or goods of another and thus bring about the sale of one man's goods as the goods of the other, the case is *damnum absque injuria* for which no action lies. *Atlanta Paper Co. v. Jacksonville Paper Co.*, 184 Ga. 205, 190 S.E. 777 (1937).

An infringement upon the real name or trade-name of an individual or corporation is such a colorable imitation of the name that the general public, in the exercise of ordinary care, might think that it is the name of the individual or corporation first appropriating the same. *Multiple Listing Serv., Inc. v. Metropolitan Multi-List, Inc.*, 223 Ga. 837, 159 S.E.2d 52 (1968), later appeal, 225 Ga. 147, 166 S.E.2d 356 (1969).

3. Proof

A. In General

Grant of equitable relief notwithstanding absence of evidence of actual unfair competition authorized. — It is not essential, as a prerequisite to the granting of equitable relief in an action for infringement of a trade name, that actual and direct market competition between the litigants be shown, and that the test as to whether equitable relief is available, should not be limited to those cases where it is shown that there has been an actual diversion of trade from one business to another. *Kay Jewelry Co. v. Kapiloff*, 204 Ga. 209, 49 S.E.2d 19 (1948).

The early common-law rule, and the rule still maintained in some jurisdictions, has been to the effect that there must be shown actual or direct competition between the litigants as an essential prerequisite to relief in an action for infringement of a trade name or unfair trade competition. Under this view, the exclusive test is whether there is a diversion of trade from one business to another, and injury to the good will and reputation of the original user of the trade name, or other injuries as contemplated by the theories of relief afford no basis for equitable relief. Under the modern view, the emphasis is no longer on direct and actual market competition, or diversion of trade from one business to another, but

rather on the injury suffered by the complaining party and the public from the confusion resulting from the infringer's acts. *Kay Jewelry Co. v. Kapiloff*, 204 Ga. 209, 49 S.E.2d 19 (1948).

Diversion of trade and the attendant direct loss of sales is not the only injury that may result from infringement of a trade name, but other injuries would necessarily follow, such as an injury to the complaining party's reputation and good will. *Kay Jewelry Co. v. Kapiloff*, 204 Ga. 209, 49 S.E.2d 19 (1948).

B. "Passing Off" Rule

The "passing off" rule is sufficient to afford a test as to whether there is unfair competition. The test under this rule is whether the goods or business of one are in fact "passed off" as the goods or business of another, and it has been said, in cases between litigants in actual and direct market competition, that nothing less than such conduct will constitute unfair competition. *Kay Jewelry Co. v. Kapiloff*, 204 Ga. 209, 49 S.E.2d 19 (1948).

Any conduct, the nature and probable tendency and effect of which is to deceive the public so as to pass off the goods or business of one person as and for the goods or business of another, constitutes actionable unfair competition. The essence thereof consists in the sale of the goods of one manufacturer or vendor for those of another. *Atlanta Paper Co. v. Jacksonville Paper Co.*, 184 Ga. 205, 190 S.E. 777 (1937).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Equity, § 20. 37 Am. Jur. 2d, Fraud and Deceit, § 257.

C.J.S. — 30 C.J.S., Equity, § 48.

ALR. — Protection of business or trading corporation against use of same or similar name by another corporation, 115 ALR 1241.

C. Intent to Deceive

Intent to deceive public as basis of unfair competition. — Any conduct, the nature and probable tendency and effect of which is to deceive the public so as to pass off the goods or business of one person as and for the goods or business of another, constitutes actionable unfair competition. *Thompson v. Alpine Motor Lodge, Inc.*, 296 F.2d 497 (5th Cir. 1961).

In Georgia, to have a word or words claimed as a trade mark protected by injunction from use by another, it should appear that the defendant's use of them was with intent to deceive or mislead the public. *Atlanta Paper Co. v. Jacksonville Paper Co.*, 184 Ga. 205, 190 S.E. 777 (1937).

Intent is a statutory element. Words, acts and conduct prove intent, and are the usual and ordinary means adopted by courts of justice to establish it. *Thompson v. Alpine Motor Lodge, Inc.*, 296 F.2d 497 (5th Cir. 1961).

Although intent must be found to warrant an injunction, when it comes to finding intent courts look to the effect of a defendant's "words, acts and conduct" and ask the objective questions of whether the plaintiff held an exclusive right to the trade mark or name and whether the defendant encroached upon it. *Thompson v. Alpine Motor Lodge, Inc.*, 296 F.2d 497 (5th Cir. 1961).

Doctrine of secondary meaning in the law of trademarks and of unfair competition, 150 ALR 1067.

Use of "family name" by corporation as unfair competition, 72 ALR3d 8.

23-2-56. Consummation of fraud.

Fraud may be consummated by signs or tricks, or through agents employed to deceive, or by any other unfair way used to cheat another. (Orig. Code 1863, § 3107; Code 1868, § 3119; Code 1873, § 3176; Code

1882, § 3176; Civil Code 1895, § 4028; Civil Code 1910, § 4625; Code 1933, § 37-705.)

JUDICIAL DECISIONS

Cited in *Floyd v. Boss*, 174 Ga. 544, 163 S.E. 606 (1932); *Jenkins v. Cobb*, 47 Ga. App. 456, 170 S.E. 698 (1933); *Morton v. Wallace*, 177 Ga. 856, 171 S.E. 720 (1933); *Hogg v. Hogg*, 206 Ga. 691, 58 S.E.2d 403 (1950); *Treadwell v. Treadwell*, 216 Ga. 156, 115 S.E.2d 535 (1960); *Gaines v. Watts*, 224 Ga. 321, 161 S.E.2d 830 (1968);

Patterson v. Castellaw, 119 Ga. App. 712, 168 S.E.2d 838 (1969); *Watts v. Gaines*, 226 Ga. 503, 175 S.E.2d 871 (1970); *Ringer v. Lockhart*, 240 Ga. 82, 239 S.E.2d 349 (1977); *Georgia Farm Bureau Mut. Ins. Co. v. First Fed. Sav. & Loan Ass'n*, 152 Ga. App. 16, 262 S.E.2d 147 (1979).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Equity, § 20. 37 Am. Jur. 2d, Fraud and Deceit, § 12 et seq.

C.J.S. — 30 C.J.S., Equity, § 48. 37 C.J.S., Fraud, § 1 et seq.

ALR. — False representations in business transaction as within statute relating to "confidence game," 9 ALR 1527; 56 ALR 727.

Use of mails for sale of articles having superstitious associations, 34 ALR 1292.

Genuine making of instrument for purpose of defrauding as constituting forgery, 41 ALR 229; 46 ALR 1529; 51 ALR 568.

23-2-57. Proving existence of fraud.

Fraud may not be presumed but, being in itself subtle, slight circumstances may be sufficient to carry conviction of its existence. (Orig. Code 1863, § 2715; Code 1868, § 2709; Code 1873, § 2751; Code 1882, § 2751; Civil Code 1895, § 4029; Civil Code 1910, § 4626; Code 1933, § 37-706.)

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
PROVING EXISTENCE OF FRAUD
PLEADING AND PRACTICE

General Consideration

This section is particularly applicable in family transactions. *Mattox v. West*, 194 Ga. 310, 21 S.E.2d 428 (1942).

This section is peculiarly applicable in transactions between husband and wife. *Strobel v. Gormley*, 50 Ga. App. 358, 178 S.E. 192 (1935).

Fraud may not be presumed, and while it may be proved by circumstances, it must nevertheless be proved. *Adams v. Higginbotham*, 194 Ga. 292, 21 S.E.2d 616 (1942); *Kazakos v. Soteris*, 120 Ga. App. 258, 170 S.E.2d 50 (1969); *Henry v. Allstate Ins. Co.*, 129 Ga. App. 223, 199 S.E.2d 338 (1973).

Though a transaction between near rela-

tives is to be scanned closely, yet some proof of its fraudulent nature must appear, and until that proof appears this rule has no application. *Kamlapat v. Purvis-Wade Carpet Mills*, 112 Ga. App. 781, 146 S.E.2d 138 (1965).

Circumstances creating a mere suspicion are not sufficient to prove fraud. *Watson v. Brown*, 186 Ga. 728, 198 S.E. 732 (1938); *Kamlapat v. Purvis-Wade Carpet Mills*, 112 Ga. App. 781, 146 S.E.2d 138 (1965).

Fraud is "in itself subtle," and circumstances apparently trivial or almost inconclusive, if separately considered, may by their number and joint operation be sufficient to constitute conclusive proof. *Grainger v. Jackson*, 122 Ga. App. 123, 176 S.E.2d 279 (1970).

Cited in *Haas & Howell v. Godby*, 33 Ga. App. 218, 125 S.E. 897 (1924), cert. denied, 33 Ga. App. 829 (1925); *Carter v. Moody*, 160 Ga. 849, 129 S.E. 163 (1925); *Boyles v. Morgan*, 168 Ga. 804, 149 S.E. 149 (1929); *Citizens & S. Nat'l Bank v. Kontz*, 185 Ga. 131, 194 S.E. 536 (1937); *Dwight v. Acme Lumber & Supply Co.*, 189 Ga. 473, 6 S.E.2d 586 (1939); *Durham Iron Co. v. Durham*, 62 Ga. App. 361, 7 S.E.2d 804 (1940); *Horton v. Johnson*, 192 Ga. 338, 15 S.E.2d 605 (1941); *Quinton v. Peck*, 195 Ga. 299, 24 S.E.2d 36 (1943); *Jones v. Hogans*, 197 Ga. 404, 29 S.E.2d 568 (1944); *Scott v. Gillis*, 202 Ga. 220, 43 S.E.2d 95 (1947); *Boney v. Smallwood*, 202 Ga. 411, 43 S.E.2d 271 (1947); *Hinchcliffe v. Pinson*, 87 Ga. App. 526, 74 S.E.2d 497 (1953); *Rountree v. Davis*, 90 Ga. App. 223, 82 S.E.2d 716 (1954); *Tillman v. Byrd*, 211 Ga. 918, 89 S.E.2d 479 (1955); *Griffin v. Kelley*, 227 F.2d 258 (5th Cir. 1955); *Sutton v. McMillan*, 213 Ga. 90, 97 S.E.2d 139 (1957); *Leverett v. Awnings, Inc.*, 97 Ga. App. 811, 104 S.E.2d 686 (1958); *Walker v. General Ins. Co.*, 214 Ga. 758, 107 S.E.2d 836 (1959); *Powell v. Grimes*, 223 Ga. 56, 153 S.E.2d 434 (1967); *Patterson v. Castellaw*, 119 Ga. App. 712, 168 S.E.2d 838 (1969); *Parker v. Spurlin*, 227 Ga. 183, 179 S.E.2d 251 (1971); *Darden v. Darden*, 227 Ga. 647, 182 S.E.2d 480 (1971); *W.H. Mulherin Constr. Co. v. Betterton*, 135 Ga. App. 223, 217 S.E.2d 454 (1975); *Clark v. Aenchbacher*, 143 Ga.

App. 282, 238 S.E.2d 442 (1977); *Tolar Constr. Co. v. GAF Corp.*, 154 Ga. App. 127, 267 S.E.2d 635 (1980); *Bob Maddox Dodge, Inc. v. McKie*, 155 Ga. App. 263, 270 S.E.2d 690 (1980); *Rose Mill Homes, Inc. v. Michel*, 155 Ga. App. 808, 273 S.E.2d 211 (1980); *Sanders v. Looney*, 247 Ga. 379, 276 S.E.2d 569 (1981).

Proving Existence of Fraud

Proof of fraud generally. — Since proof of fraud is seldom if ever possible by direct evidence, recourse to circumstantial evidence is a necessity, and there is no kind of action wherein it can be held with greater reason that the fact in issue may be inferred from other facts proved. *Durrence v. Durrence*, 224 Ga. 620, 163 S.E.2d 740 (1968).

Rarely, if ever, can a fraudulent intent be shown by direct proof, and where transactions between relatives are under review, slight circumstances are often sufficient to induce belief on the part of the jury that there was fraud between the parties. *Bucher v. Murray*, 212 Ga. 259, 91 S.E.2d 610 (1956).

An attack on a will as having been obtained by undue influence may be supported by a wide range of testimony, since such influence can seldom be shown except by circumstantial evidence. Thus, a confidential relation between the parties, the reasonableness or unreasonableness of the disposition of the testator's estate, old age, or disease affecting the strength of the mind, tending to support any other direct testimony or any other proven fact or circumstance going to show the exercise of undue influence on the mind and will of the testator, are relevant. While the quantity of influence varies with the circumstances of each case, according to the relations existing between the parties and the strength or weakness of mind of the testator, the amount of influence necessary to dominate a mind impaired by age or disease may be decidedly less than that required to control a strong mind. *Bowman v. Bowman*, 205 Ga. 796, 55 S.E.2d 298 (1949).

According to the relations existing between the parties and the strength or

weakness of mind of a testator, the amount of influence necessary to dominate a mind impaired by age or disease may be decidedly less than that required to control a strong mind. *Fowler v. Fowler*, 197 Ga. 53, 28 S.E.2d 458 (1943).

Where the grantor of an "improvident or profuse" deed was not wholly incapable of entering into such a contract, but was possessed of little or no will power and was greatly under the influence of the nephew to whom the deed was executed, an inference of fraud could have been drawn by the jury, and, the evidence for the defendant grantee not being such as to rebut the inference as a matter of law, the court was authorized to charge the jury upon the subject of fraud. *Stanley v. Stanley*, 179 Ga. 135, 175 S.E. 496 (1934).

While the broad statement that the conduct of the defendant constituted fraud would be insufficient without an allegation of circumstances from which the court might determine whether the pleader reached the right conclusion in saying that a fraud was committed, still it is not essential to state more facts than may be necessary to carry conviction of the existence of fraud. *Wall v. Wall*, 176 Ga. 757, 168 S.E. 893 (1933).

"Great inadequacy of consideration, joined with great disparity of mental ability in contracting a bargain, may justify equity in setting aside a sale or other contract." Under that principle, a deed may be set aside in equity, on proof to the two elements stated, "without proof of anything else" as to fraud. A fortiori, the same rule would apply with at least equal force in case of such mental disparity and a total absence of consideration. *Stow v. Hargrove*, 203 Ga. 735, 48 S.E.2d 454 (1948).

The evidence showing that a 75-year old woman, uneducated, with neither the ability to read nor write, was dealing with an experienced businessman under circumstances indicating a fraud establishes that there was an imbalance or "disparity of mental ability in contracting a bargain." *Top Quality Homes, Inc. v. Jackson*, 231 Ga. 844, 204 S.E.2d 600 (1974).

Circumstances apparently trivial or almost inconclusive, if separately considered, may by their number and joint operation, especially when corroborated by moral coincidences, be sufficient to consti-

tute conclusive proof. *Kelly v. Cubbedge*, 143 Ga. App. 830, 240 S.E.2d 162 (1977).

In every case slight circumstances must be considered, and may be sufficient to establish the existence of fraud; in transactions between husband and wife fraud might be so completely concealed that creditors could not expose it, and in order that the public might not suffer from such concealment, the law imposes upon the husband and wife the duty of affirmatively establishing their good faith when creditors attack such transactions for fraud. *Arrington v. Awbrey*, 190 Ga. 193, 8 S.E.2d 648 (1940).

Where transactions between relatives are under review, slight circumstances are often sufficient to induce belief on the part of a jury that there was fraud or collusion between the parties, and authorize them to find against the claimant and in favor of the plaintiff in *fi. fa.* A claimant must, generally speaking, come into court with hands unstained by any suggestion of collusion with the defendant in *fi. fa.* to defeat or defraud the creditors of the latter; and a claimant who fails to make a clear showing of both legal and moral right to the property in dispute must generally suffer the loss thereof at the hands of a jury, if there be any circumstances in proof, even though slight, which may be sufficient to authorize the inference of fraud or collusion. *Scruggs v. Blackshear Mfg. Co.*, 49 Ga. App. 205, 174 S.E. 732 (1934).

Pleading and Practice

Slight evidence of fraud and undue influence may authorize the jury to cancel the deed. *Harper v. Harper*, 229 Ga. 583, 193 S.E.2d 616 (1972).

Where the facts and circumstances shown by the evidence submitted by both parties on a motion for summary judgment are sufficient to authorize inferences as to fraudulent intent, the issue should be resolved by a jury on a trial, as there is a genuine issue of material fact. *Nixon v. Brown*, 225 Ga. 811, 171 S.E.2d 512 (1969).

Whether a note or other writing was procured by fraud is a question of fact for the determination of a jury. *Thompson v. Wilkins*, 143 Ga. App. 739, 240 S.E.2d 183 (1977).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Equity, § 20. 37 Am. Jur. 2d, Fraud and Deceit, § 468 et seq. **C.J.S.** — 30 C.J.S., Equity, § 48. 37 C.J.S., Fraud, § 94 et seq.

23-2-58. Confidential relations defined.

Any relationship shall be deemed confidential, whether arising from nature, created by law, or resulting from contracts, where one party is so situated as to exercise a controlling influence over the will, conduct, and interest of another or where, from a similar relationship of mutual confidence, the law requires the utmost good faith, such as the relationship between partners, principal and agent, etc. (Orig. Code 1863, § 3108; Code 1868, § 3120; Code 1873, § 3177; Code 1882, § 3177; Civil Code 1895, § 4030; Civil Code 1910, § 4627; Code 1933, § 37-707.)

Cross references. — As to agency generally, see Ch. 6, T. 10. As to confidential relations for purposes of exclusion of evidence, see § 24-9-20 et seq.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

CONFIDENTIAL RELATIONS GENERALLY

1. IN GENERAL

2. SPECIFIC RELATIONSHIPS

PRESUMPTION OF UNDUE INFLUENCE

General Consideration

This section is not applicable to confidential relations for the purposes of exclusion of evidence. *Guy v. State*, 138 Ga. App. 11, 225 S.E.2d 492 (1976).

There is never a presumption of confidential relationship. The burden is upon the party asserting same to establish its existence. *United States ex rel. Meva Corp. v. Northeast Constr. Co.*, 298 F. Supp. 1135 (S.D. Ga. 1969).

A confidential relationship does not exist prior to the contract or legal relationship creating it, unless it exists for other reasons. *Cole v. Cates*, 113 Ga. App. 540, 149 S.E.2d 165 (1966).

Whether or not the confidential relationship of partners applies to

transactions outside of the scope of the partnership, it does not apply where it appears that the partnership was not in existence at the time of the transaction under consideration. *Hancock v. Gunter*, 195 Ga. 646, 24 S.E.2d 772 (1943).

Party to confidential relationship may rely upon representations of other party.

— The reason for the rule that a party to a confidential or fiduciary relationship may rely upon representations made is that by the very terms or circumstances of the arrangement of dealings between the parties there rests upon the party acting for another the duty of protecting and furthering the interests of the person for whom he is acting, not those of himself or of any one else. The person so placing trust in him by virtue of this confidential

relationship is justified by the situation of this interest in believing that the other party will act fairly and make true representations. *Dover v. Burns*, 186 Ga. 19, 196 S.E. 785 (1938).

And the required degree of care to detect fraud is much less where there is a confidential relationship between two parties than in cases where parties deal at arm's length. *United States ex rel. Meva Corp. v. Northeast Constr. Co.*, 298 F. Supp. 1135 (S.D. Ga. 1969).

Therefore, ordinary diligence not required where confidential relationship exists. — The numerous decisions to the effect that a party who can read must read, and that fraud which will relieve a party who can read must be such as prevents him from reading, apply to situations where the parties are dealing with each other at arms length, and have no application to a situation where the confidential and fiduciary relation of principal and agent is involved. *Harrison v. Harrison*, 214 Ga. 393, 105 S.E.2d 214 (1958).

Cited in *Boyles v. Morgan*, 168 Ga. 804, 149 S.E. 149 (1929); *White v. Dotson*, 41 Ga. App. 436, 153 S.E. 233 (1930); *Herrington v. Herrington*, 42 Ga. App. 126, 155 S.E. 51 (1930); *Allen v. Southern Ins. Sec. Corp.*, 54 Ga. App. 316, 187 S.E. 714 (1936); *Blount v. Dean*, 187 Ga. 494, 1 S.E.2d 653 (1939); *Armour v. Lunsford*, 192 Ga. 598, 15 S.E.2d 886 (1941); *Manning v. Wills*, 193 Ga. 82, 17 S.E.2d 261 (1941); *Dorsey v. Green*, 204 Ga. 453, 49 S.E.2d 901 (1948); *Larkins v. Boyd*, 205 Ga. 69, 52 S.E.2d 307 (1949); *Hogg v. Hogg*, 206 Ga. 691, 58 S.E.2d 403 (1950); *Childs v. Shepard*, 213 Ga. 381, 99 S.E.2d 129 (1957); *Dixie Belle Mills, Inc. v. Specialty Mach. Co.*, 217 Ga. 104, 120 S.E.2d 771 (1961); *Johnson v. Hutchinson*, 217 Ga. 489, 123 S.E.2d 551 (1962); *Rushing v. Bashlor*, 219 Ga. 119, 131 S.E.2d 775 (1963); *Brogdon v. Purvis*, 220 Ga. 28, 136 S.E.2d 719 (1964); *Fuller v. Dillon*, 220 Ga. 36, 136 S.E.2d 733 (1964); *Weddle v. Webb*, 224 Ga. 674, 164 S.E.2d 129 (1968); *Bloodworth v. Bloodworth*, 224 Ga. 717, 164 S.E.2d 823 (1968); *Parker v. Spurlin*, 227 Ga. 183, 179 S.E.2d 251 (1971); *Tingle v. Harvill*, 228 Ga. 332, 185 S.E.2d 539 (1971).

Confidential Relations Generally

1. In General

This section does not attempt to comprehensively enumerate the cases wherein the relation of mutual confidence is present. The showing of a relationship in fact which justifies the reposing of confidence by one party in another is all the law requires. *Cochran v. Murrah*, 235 Ga. 304, 219 S.E.2d 421 (1975).

The relationships listed as examples in this section are not exclusive, as shown by the use of the abbreviation "etc." and the phrase "where one party is so situated . . ." *Cochran v. Murrah*, 235 Ga. 304, 219 S.E.2d 421 (1975).

This section goes beyond the strict fiduciary relations of the parties to the particular circumstances of the case. *Cochran v. Murrah*, 235 Ga. 304, 219 S.E.2d 421 (1975).

Although some confidential relationships are created by law and contract (e.g., partners), others may be created by the facts of the particular case. *Cochran v. Murrah*, 235 Ga. 304, 219 S.E.2d 421 (1975).

In addition to partners and principals and agents, it has been held that confidential relationships may exist between husband and wife, brother and sister, and even banks and creditors of a depositor. *Cochran v. Murrah*, 235 Ga. 304, 219 S.E.2d 421 (1975).

The mere fact that one reposes trust and confidence in another does not create a confidential relationship. *Thomas v. Eason*, 208 Ga. 822, 69 S.E.2d 729 (1952); *Lewis v. Alderman*, 117 Ga. App. 855, 162 S.E.2d 440 (1968); *United States ex rel. Meva Corp. v. Northeast Constr. Co.*, 298 F. Supp. 1135 (S.D. Ga. 1969).

The fact that an unlearned and uneducated person reposes trust and confidence in another does not create a confidential relationship. *Clinton v. State Farm Mut. Auto Ins. Co.*, 110 Ga. App. 417, 138 S.E.2d 687 (1964).

The mere fact that the defendant had confidence in the party with whom he contracted does not constitute a confidential relationship or a "similar relationship of mutual confidence" within the meaning of this section so as to require the application

of § 23-2-59. *Cole v. Cates*, 113 Ga. App. 540, 149 S.E.2d 165 (1966).

Allegation that defendant was a frequent visitor in the plaintiff's home and that he had been a close personal, confidential and business adviser to the plaintiff did not establish the existence of a confidential relationship between them within the meaning of this section. *Charles v. Simmons*, 215 Ga. 794, 113 S.E.2d 604, cert. denied, 364 U.S. 871, 81 S. Ct. 113, 5 L. Ed. 2d 93 (1960).

The fact that it is alleged that a plaintiff reposed trust and confidence in the defendant does not create a confidential relationship. In the majority of business dealings opposite parties have trust and confidence in each other's integrity, but there is no confidential relationship by this alone. This state of facts does not bring the plaintiff within the protection of this section. *Dover v. Burns*, 186 Ga. 19, 196 S.E. 785 (1938).

2. Specific Relationships

Businessmen. — A confidential relationship may exist between businessmen, depending on the facts. *Cochran v. Murrah*, 235 Ga. 304, 219 S.E.2d 421 (1975).

In the majority of business dealings, opposite parties have trust and confidence in each other's integrity, but there is no confidential relationship by this alone. *Lewis v. Alderman*, 117 Ga. App. 855, 162 S.E.2d 440 (1968).

Clergyman and parishioner. — It can be found that a clergyman occupies a confidential relationship toward a member of his church. *Bryan v. Norton*, 245 Ga. 347, 265 S.E.2d 282 (1980).

Employer and employee. — Employee and employer is not the type of relationship such as that of principal and agent from which the law will necessarily imply confidentiality. *Cochran v. Murrah*, 235 Ga. 304, 219 S.E.2d 421 (1975).

Even though generally the relationship between an employer and employee is that of arms length bargaining, this is not to say, however, that under a particular fact situation a confidential relationship can never exist between an employer and his employee (e.g., an employer signing checks prepared by his secretary-bookkeeper).

Cochran v. Murrah, 235 Ga. 304, 219 S.E.2d 421 (1975).

Executor and legatee. — The relation between an executor and the devisees under a will is to a certain extent a relation of confidence and trust. *Dorsey v. Green*, 202 Ga. 655, 44 S.E.2d 377 (1947), later appeal, 204 Ga. 436, 49 S.E.2d 901 (1948).

The policy of the law forbids that administrators, executors, or trustees, having duties to perform in reference to property for their *cestuis que trust*, should deal with the beneficiaries with respect thereto, except upon the footing of the utmost candor and upon considerations demonstrative of the absence of any undue advantage. *Dorsey v. Green*, 202 Ga. 655, 44 S.E.2d 377 (1947), later appeal, 204 Ga. 436, 49 S.E.2d 901 (1948).

An executor cannot purchase property from himself, directly or indirectly, and if he does so the sale will be set aside at the instance of a legatee who is not in laches, however fair and honest it may have been. He may, however, purchase the property from a legatee who is *sui juris* and laboring under no disability, where all the circumstances of the transaction are fair and open, and no advantage is taken by him of the legatee by concealment, misrepresentation, or omission to state any important fact, or by the exercise or undue influence, and the legatee understands the nature and effect of his act. *Dorsey v. Green*, 202 Ga. 655, 44 S.E.2d 377 (1947), later appeal, 204 Ga. 436, 49 S.E.2d 901 (1948).

A court of equity looks upon the purchase of estate property by the executor from a legatee with jealous eye, and will not uphold it, unless it appears that the sale is fair, and that there is no fraud, no concealment, and no advantage taken by the executor of information acquired by him in his character as such. *Dorsey v. Green*, 202 Ga. 655, 44 S.E.2d 377 (1947), later appeal, 204 Ga. 436, 49 S.E.2d 901 (1948).

Friendship. — That the defendant was or had been a friend of the plaintiff would not alone create a relation of trust or confidence between them. *Norris v. Hart*, 74 Ga. App. 444, 40 S.E.2d 96 (1946).

Partners. — Partners, stand in a confidential relationship to each other. *Crosby v. Rogers*, 197 Ga. 616, 30 S.E.2d 248 (1944).

Petitioner was justified in failing to read deed which he signed or to examine the records, and in relying upon the defendant, because of the confidential relationship existing between them as partners, and where suit was brought promptly upon learning of the defendant's breach of faith the petitioner was not estopped by laches although 14 years had passed since the deed attacked was executed. *Crosby v. Rogers*, 197 Ga. 616, 30 S.E.2d 248 (1944).

Under the evidence as to the existence of a partnership between the petitioner and the defendant and their agreement to jointly purchase the land involved, and evidence that the petitioner paid one-half of the purchase money and trusted the defendant to close the deal and obtain a conveyance naming them both as grantees, the defendant could not obtain an interest in the land antagonistic to that of the petitioner; and where the defendant procured a deed, in his own name only, equity would annul the conveyance and decree title in the petitioner to his share. *Crosby v. Rogers*, 197 Ga. 616, 30 S.E.2d 248 (1944).

Principal and agent. — The relationship of principal and agent is fiduciary in character, and imposes upon the parties the duties of exercising toward each other the utmost good faith. *Reisman v. Massey*, 84 Ga. App. 796, 67 S.E.2d 585 (1951).

The law implies as a part of the contract by which every agency arises that the agent agrees to have and exercise for and toward his principal loyalty and absolute good faith, and any breach of this implied contract on his part forfeits his right to commissions. *Reisman v. Massey*, 84 Ga. App. 796, 67 S.E.2d 585 (1951).

The relationship of principal and agent, being confidential and fiduciary in character, demands of the agent the utmost loyalty and good faith to his principal. Any breach of this good faith whereby the principal suffers any disadvantage and the agent reaps any benefit is a fraud of such nature as to preclude the agent from taking or retaining the benefit. *Harrison v. Harrison*, 214 Ga. 393, 105 S.E.2d 214 (1958).

Where the relation of principal and agent was established when the owner, listed her property for sale with the realty

company, such being a confidential or fiduciary relation, it imposed on the agent the duty of exercising the utmost good faith and loyalty toward the principal. It became the duty of the agent to act primarily and solely for the benefit of the principal in all matters connected with the agency. *Dolvin Realty Co. v. Holley*, 203 Ga. 618, 48 S.E.2d 109 (1948).

The law implies, as a part of the contract by which every agency arises, that the agent agrees to have and exercise towards his principal diligence, loyalty and absolute good faith. *Anderson v. Redwal Music Co.*, 122 Ga. App. 247, 176 S.E.2d 645 (1970).

Whatever may be the reciprocal duties imposed by law on a real estate broker and his principal, the relationship is one of mutual confidence, and the law requires that the broker, in the discharge of his duties, act towards his principal in the utmost good faith. *Lyle v. Etheridge*, 40 Ga. App. 808, 151 S.E. 531 (1930).

Although a real estate broker, when obtaining for the owner of real estate a tenant for the property, is under no duty, arising out of the relationship to his principal, to guarantee the financial standing of the lessee and the lessee's ability to perform the proposed lease contract, yet where the broker makes a knowingly false representation to his principal, the owner of the property, as to the financial standing of the lessee and the lessee's ability to perform the proposed lease contract, and thereby induces the principal to accept the tenant procured by the broker and to pay to the broker a commission for his services in procuring the tenant, he thereby perpetrates a fraud upon his principal, for which the principal, in a suit against the broker, may recover for the damages sustained. *Lyle v. Etheridge*, 40 Ga. App. 808, 151 S.E. 531 (1930).

It is for the common security of mankind "that gifts procured by agents, and purchases made by them, from their principal, should be scrutinized with a close and vigilant suspicion." *Harrison v. Harrison*, 214 Ga. 393, 105 S.E.2d 214 (1958).

The mere fact that one of the two parties to a contract of sale between them is known to the other to be a real estate broker, when the broker is not acting as the agent for the buyer but is himself the seller of the prop-

erty, will fail to show a fiduciary relationship. *Lewis v. Alderman*, 117 Ga. App. 855, 162 S.E.2d 440 (1968).

Answer, alleging that the plaintiff broker misrepresented the financial ability of the buyer, that is, that the buyer was ready, willing and able to buy on the terms stipulated by the seller, thereby inducing the defendant to accept the buyer's offer and to enter into a contract which the buyer was unable to perform, set out a breach of the broker's duty of exercising the utmost good faith toward his principal, the seller, which was a defense to the broker's action for commissions. *Reisman v. Massey*, 84 Ga. App. 796, 67 S.E.2d 585 (1951).

Because of fiduciary relationship, the petitioner was justified in relying upon the representations of her agent and in failing to read and know the contents of the various deeds signed by her. *Harrison v. Harrison*, 214 Ga. 393, 105 S.E.2d 214 (1958).

An agent cannot place himself in a position in which his duty and interest conflict with that of his principal, or be permitted to make a secret profit out of his agency. *Franco v. Stein Steel & Supply Co.*, 227 Ga. 92, 179 S.E.2d 88 (1970).

Where the fiduciary relationship of principal and agent existed between the petitioner and the defendant, the latter could not make advantage or profit for himself out of the relationship to the injury of his principal. *Harrison v. Harrison*, 214 Ga. 393, 105 S.E.2d 214 (1958).

If the agent practices upon the principal any deception (whether intentional or not) whereby the principal is misled and damaged and the agent would reap any benefit, the transaction is fraudulent, and the courts will not allow the agent to take or retain the benefit. *Reisman v. Massey*, 84 Ga. App. 796, 67 S.E.2d 585 (1951).

Property owner and contractor. — Evidence of previous dealings between defendant property owner and plaintiff contractor in connection with a number of nursing home projects, coupled with evidence of the circumstances surrounding the instant transaction between the parties, was sufficient to authorize a charge on "confidential relations" under this section. *Davis v. Carpenter*, 155 Ga. App. 301, 270 S.E.2d 810 (1980).

Relatives. — A confidential relationship does not exist because of brother and sister-in-law relationship, or because of past dealings and trust and confidence reposed in brother-in-law by sister-in-law and her husband, defendant's brother. *Dixon v. Dixon*, 211 Ga. 557, 87 S.E.2d 369 (1955).

The fact that the plaintiff and the defendant are brothers does not of itself create a confidential or fiduciary relation between them. If such relation exists between brothers, it must be shown by proof, and the burden is upon the party asserting the existence of such relationship to affirmatively show the same. *Hancock v. Hancock*, 223 Ga. 481, 156 S.E.2d 354 (1967).

While the fact that the plaintiff and the decedent were brother and sister would not of itself create a confidential or fiduciary relationship between them solely because they were so related, plaintiff's allegations were sufficient to charge the existence of a confidential relationship between them requiring the utmost good faith and fair dealings on his part. *Sutton v. McMillan*, 213 Ga. 90, 97 S.E.2d 139 (1957).

The facts that the bank officer was the brother of plaintiff's daughter-in-law, solicited plaintiff and induced him to place his business with the bank, promised to keep his affairs confidential, and to treat plaintiff right, are insufficient to create a confidential relationship. *First Am. Bank v. Bishop*, 244 Ga. 317, 260 S.E.2d 49 (1979).

Vendor and vendee. — The vendor and vendee of property are not, by virtue of such fact, placed in a confidential relationship to each other, but on the contrary are presumed to be dealing at arm's length. *Lewis v. Alderman*, 117 Ga. App. 855, 162 S.E.2d 440 (1968).

Under the facts no confidential relationship was shown between wholesale vendor of liquor and purchaser who claimed that vendor had misrepresented the tax status of the liquors purchased. *Bernstein v. Peters*, 69 Ga. App. 525, 26 S.E.2d 192 (1943).

In a suit by vendor against purchaser for reformation of a deed to land to show reservation of timber, where neither fraud nor the existence of a confidential relationship was alleged or proved, it was reversible error to charge that, if the jury found that the vendor relied on the rep-

representations of the purchaser as being true due to a confidential or fiduciary relationship between the parties, and if the vendor was ignorant of the fact that reservation should have been inserted in the deed, purchaser would be guilty of fraud, and that equity will reform instrument when there was ignorance or mistake on one side and fraud or inequitable conduct on the other. *Cochran v. Kendall*, 210 Ga. 336, 80 S.E.2d 273 (1954).

Presumption of Undue Influence

Evidence of confidential relationship raises presumption of undue influences.

— Where evidence is presented of a confidential relationship, the grantor being of weaker mentality and the grantee occupying the dominant position, an issue of fact is raised as to undue influence. *Fletcher v. Fletcher*, 242 Ga. 158, 249 S.E.2d 530 (1978).

While a mere allegation of weakness of mind not amounting to imbecility is not sufficient to set forth a cause of action for cancellation of a deed, there being no allegation of fraud or undue influence, nevertheless, where the mental weakness is pronounced, such as would prevent the grantor from understanding the nature of

his act at the time the deed was executed and especially where as alleged such mental impairment is united with alleged undue and controlling influence on the part of one occupying a confidential relationship with the illiterate grantor, it will authorize a cancellation on the ground of fraud. *Mullins v. Barrett*, 204 Ga. 11, 48 S.E.2d 842 (1948).

Where the evidence and the pleadings show that the deceased was an infirm and aged woman, suffering from a brain tumor, whose mental and physical condition declined during the last years of her life, weakened by the damage to her brain by the illness from which she died, and that the defendants stood in a confidential and fiduciary capacity to her, whereby they administered her medicines to her and cared for her in her illness, took care of her personal business, hired nurses for her, cared for her in their home, and she changed her bank account to make it a joint one with her nephew, one of the defendants, there arose a presumption of undue influence, and the court should have charged on undue influence and the shifting of the burden of proof, and erred in failing to charge thereon. *McGahee v. Walden*, 216 Ga. 352, 116 S.E.2d 559 (1960).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Equity, § 20. 37 Am. Jur. 2d, Fraud and Deceit, §§ 15, 16.

C.J.S. — 30 C.J.S., Equity, § 48. 37 C.J.S., Fraud, §§ 2, 16, 35.

ALR. — Duty of joint adventures inter se in respect of acquisition or renewal of property rights or interests related to the enterprise, 62 ALR 13.

Trustee's, executor's, administrator's or guardian's purchase from or sale to corporation of which he is an officer or stockholder, as voidable or as ground for surcharging his account, 105 ALR 449.

Duty of vendor of real property to disclose to purchaser condition of building thereon which affects health or safety of persons using same, 141 ALR 967.

23-2-59. Acquisition of antagonistic rights by one in confidential relationship.

Where, by the act or consent of parties or the act of a third person or of the law, one person is placed in such relation to another that he becomes interested for him or with him in any subject or property, he is prohibited from acquiring rights in that subject or property which are antagonistic to the person with whose interest he has become associated.

(Civil Code 1895, § 4031; Civil Code 1910, § 4628; Code 1933, § 37-708.)

History of section. — This section is derived from the decision in *Larey v. Baker*, 86 Ga. 468, 12 S.E. 684 (1890).

JUDICIAL DECISIONS

A confidential relationship exists where one party occupies a position of trust and confidence with respect to another. Such a relationship can exist between an executor representing an estate of a decedent, and a legatee or devisee of the estate represented in administration. *Ringer v. Lockhart*, 240 Ga. 82, 239 S.E.2d 349 (1977).

Where the fiduciary relationship of principal and agent existed between the petitioner and the defendant, the latter could not make advantage or profit for himself out of the relationship to the injury of his principal. *Harrison v. Harrison*, 214 Ga. 393, 105 S.E.2d 214 (1958).

Where a widow and named executrix under the will of a decedent, who is left a life estate in all of the property of the decedent, advises the sole nonresident remainderman named in the will that the father's estate would be handled fairly and that he would not have to worry about his father's estate, immediately, without actual notice to him applies for and obtains an uncontested year's support awarding to her all of the property of the decedent's estate, a question is presented, as to whether or not the year's support judgment was obtained by fraud. *Ringer v. Lockhart*, 240 Ga. 82, 239 S.E.2d 349 (1977).

Under the evidence as to the existence of a partnership between the petitioner and the defendant and their agreement to jointly purchase the land involved, and evidence that the petitioner paid one-half of

the purchase money and trusted the defendant to close the deal and obtain a conveyance naming them both as grantees, the defendant could not obtain an interest in the land antagonistic to that of the petitioner; and where the defendant procured a deed, in his own name only, equity would annul the conveyance and decree title in the petitioner to his share. *Crosby v. Rogers*, 197 Ga. 616, 30 S.E.2d 248 (1944).

The relationship of principal and agent, being confidential and fiduciary in character, demands of the agent the utmost loyalty and good faith to his principal. Any breach of this good faith whereby the principal suffers any disadvantage and the agent reaps any benefit is a fraud of such nature as to preclude the agent from taking or retaining the benefit. *Harrison v. Harrison*, 214 Ga. 393, 105 S.E.2d 214 (1958).

Cited in *Napier v. Adams*, 166 Ga. 403, 143 S.E. 566 (1928); *White v. Dotson*, 41 Ga. App. 436, 153 S.E. 233 (1930); *Thompson v. State*, 47 Ga. App. 229, 170 S.E. 328 (1933); *Blount v. Dean*, 187 Ga. 494, 1 S.E.2d 653 (1939); *Crosby v. Rogers*, 197 Ga. 616, 30 S.E.2d 248 (1944); *Smith v. Merck*, 206 Ga. 361, 57 S.E.2d 326 (1950); *Howard v. Lee*, 208 Ga. 735, 69 S.E.2d 263 (1952); *Johnson v. Hutchinson*, 217 Ga. 489, 123 S.E.2d 551 (1962); *Brogdon v. Purvis*, 220 Ga. 28, 136 S.E.2d 719 (1964); *Cole v. Cates*, 113 Ga. App. 540, 149 S.E.2d 165 (1966).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Equity, § 20. 37 Am. Jur. 2d, Fraud and Deceit, §§ 15, 16.

C.J.S. — 30 C.J.S., Equity, § 48. 37 C.J.S., Fraud, § 2.

ALR. — Right of insolvent to insure life for benefit of relatives, 34 ALR 838.

Rights and remedies of original licensee or his estate, against one in fiduciary or confidential relation who acquires in his own name an occupational or business license, 144 ALR 1013.

23-2-60. Annulment of conveyances for fraud; relief against awards, judgments, and decrees.

Fraud will authorize equity to annul conveyances, however solemnly executed, and to relieve against awards, judgments, and decrees obtained by imposition. (Orig. Code 1863, § 3109; Code 1868, § 3121; Code 1873, § 3178; Code 1882, § 3178; Civil Code 1895, § 4032; Civil Code 1910, § 4629; Code 1933, § 37-709.)

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
EQUITABLE RELIEF GENERALLY
STATUTE OF LIMITATIONS
PLEADING AND PRACTICE

General Consideration

A court of equity will not lend its aid to a party to a contract founded upon an illegal or immoral consideration; if the contract is executed, it will be left to stand, and if it be executory, neither party can enforce it. *Fender v. Crosby*, 209 Ga. 896, 76 S.E.2d 769 (1953).

A person executing an instrument is not defrauded because he failed to read or understand it. *Manget Realty Co. v. Carolina Realty Co.*, 169 Ga. 495, 150 S.E. 828 (1929).

Where one party fraudulently induces his adversary to withdraw his defense, the judgment will be set aside. *Walker v. Hall*, 176 Ga. 12, 166 S.E. 757 (1932).

When a litigant keeps the opposite party from court, equity will relieve against the judgment obtained in his absence. *Walker v. Hall*, 176 Ga. 12, 166 S.E. 757 (1932).

The mere failure of a party to disclose to the court or to his adversary matters which would defeat his own claim or defense is not such fraud as will justify or require a vacation of the judgment. *Buice v. T. & B. Bldrs., Inc.*, 219 Ga. 259, 132 S.E.2d 784 (1963).

A mere failure to comply with a promise on the part of a grantee is insufficient to establish fraudulent intent. However, where a petition alleges an oral promise by the grantee to perform an act in the future

as the inducement or consideration for the execution of the deed by the grantor and where the promise is made with the present intention on the part of the grantee not to comply with it, the petition sets forth a cause of action for cancellation. *Smith v. Merck*, 206 Ga. 361, 57 S.E.2d 326 (1950); *Sutton v. McMillan*, 213 Ga. 90, 97 S.E.2d 139 (1957); *Hinson v. Hinson*, 221 Ga. 291, 144 S.E.2d 381 (1965); *Cowart v. Gay*, 223 Ga. 635, 157 S.E.2d 466 (1967); *Dye v. Dye*, 231 Ga. 533, 202 S.E.2d 418 (1973); *Cone Mills Corp. v. A.G. Estes, Inc.*, 377 F. Supp. 222 (N.D. Ga. 1974).

The mere failure to comply with a promise to perform an act in the future is not fraud in a legal sense. *Hinson v. Hinson*, 221 Ga. 291, 144 S.E.2d 381 (1965); *Lanning v. Sockwell*, 137 Ga. App. 479, 224 S.E.2d 119 (1976).

While the mere failure to comply with a promise is insufficient to establish an inceptive fraudulent intent, fraud will authorize equity to cancel and annul a deed no matter how solemnly executed. *Sutton v. McMillan*, 213 Ga. 90, 97 S.E.2d 139 (1957).

Cited in *Bank of Penfield v. Colclough*, 154 Ga. 222, 114 S.E. 33 (1922); *J.R. Watkins Co. v. Herring*, 51 Ga. App. 396, 180 S.E. 525 (1935); *McGhee v. Minor*, 188 Ga. 635, 4 S.E.2d 565 (1939); *Saliba v. Saliba*, 202 Ga. 279, 42 S.E.2d 748 (1947);

McGahee v. McGahee, 204 Ga. 91, 48 S.E.2d 675 (1948); Johnson v. Hutchinson, 217 Ga. 489, 123 S.E.2d 551 (1962); Rushing v. Bashlor, 219 Ga. 119, 131 S.E.2d 775 (1963); Brogdon v. Purvis, 220 Ga. 28, 136 S.E.2d 719 (1964); Gaines v. Watts, 224 Ga. 321, 161 S.E.2d 830 (1968); Watts v. Gaines, 226 Ga. 503, 175 S.E.2d 871 (1970); Department of Transp. v. Livaditis, 129 Ga. App. 358, 199 S.E.2d 573 (1973); Hall v. Hall, 230 Ga. 873, 199 S.E.2d 798 (1973); Roberts v. Cameron-Brown Co., 556 F.2d 356 (5th Cir. 1977); Morgan v. Hawkins, 155 Ga. App. 836, 273 S.E.2d 221 (1980).

Equitable Relief Generally

To determine whether equity will set aside an award for fraud, §§ 23-2-1, 23-2-54 and 23-2-60 must be construed together. Tinsley v. Maddox, 176 Ga. 471, 168 S.E. 297 (1933).

Fraud will authorize a court of equity to set aside a written instrument. Lanning v. Sockwell, 137 Ga. App. 479, 224 S.E.2d 119 (1976).

When the failure to perform the promised act is coupled with the present intention not to perform, fraud, in the legal sense, is present. This is known as inceptive fraud, and is sufficient to support an action for cancellation of a written instrument. Hinson v. Hinson, 221 Ga. 291, 144 S.E.2d 381 (1965); Lanning v. Sockwell, 137 Ga. App. 479, 224 S.E.2d 119 (1976).

Where it is alleged that the sole consideration for the execution of the deed from the grantor to the grantee is the promise of the grantees to support, maintain, provide, and care for a third party, and that this promise is made by the grantees fraudulently and for the purpose of securing the signature of the grantor, to the conveyance, and that the grantees never intend to comply with their agreement, the allegations are sufficient to state a cause of action on the ground of inceptive fraud. Bucher v. Christopher, 211 Ga. 317, 85 S.E.2d 760 (1955).

Any representation, act, or artifice intended to deceive, and which does deceive another, is such a fraud as may authorize cancellation of a written contract, but a party to a contract who can read must read or show a legal excuse for not doing

so, and ordinarily, if fraud is the excuse, it must be such fraud as prevents the party from reading; nor in such case will a mere fraudulent statement by the opposite party or his agent as to the contents of the writing furnish a legal excuse. And where the contract is a deed to land, the rule will generally apply to the grantee as well as the grantor. Livingston v. Barnett, 193 Ga. 640, 19 S.E.2d 385 (1942).

A cancellation obtained by fraud or mistake without payment may itself be canceled by equity. Grimmett v. Barnwell, 184 Ga. 461, 192 S.E. 191 (1937); Lanning v. Sockwell, 137 Ga. App. 479, 224 S.E.2d 119 (1976).

If the execution of the contract was merely one of the incidents or stages by which the deed plaintiff sought to cancel was procured, evidence tending to show that the contract itself was procured by fraud was admissible for the purpose of canceling the deed. Morton v. Wallace, 177 Ga. 856, 171 S.E. 720 (1933).

While the terms of an absolute deed cannot be varied by limiting the grantee to a use of the land in a manner not restricted by the express terms of the deed, it may nevertheless be alleged and proved that it was induced by fraud, without denying or varying any of the stipulations or conditions contained in the deed. Bucher v. Christopher, 211 Ga. 317, 85 S.E.2d 760 (1955).

Where land is owned by two persons, and one obtains a deed from the other to his interest by means of an intentionally false and fraudulent promise to sell the land at its true value and pay off an encumbrance and account for the balance, or failing to find a purchaser, he will procure a new loan to discharge the present encumbrance, and after obtaining the title he retains and claims the property as absolutely his own, this transaction by which the ownership is obtained is such a fraud as will entitle the grantor to have the deed canceled. Smith v. Merck, 206 Ga. 361, 57 S.E.2d 326 (1950).

Equity will grant relief where the transfer of a valuable property has been fraudulently extorted, for a grossly inadequate consideration, from a person while in such a state of intoxication as to render him incapable of transacting business. Ealy v.

Tolbert, 209 Ga. 575, 74 S.E.2d 867, later appeal, 210 Ga. 96, 78 S.E.2d 26 (1953).

Where a party at the time of entering into a contract or executing an instrument is intoxicated to such a degree as to deprive him of his reason and to disqualify his mind to apprehend the nature of his act and its probable consequences, a court of equity may grant relief by rescission and cancellation. *McKaig v. Hardy*, 196 Ga. 582, 27 S.E.2d 11 (1943); *Ealy v. Tolbert*, 209 Ga. 575, 74 S.E.2d 867, later appeal, 210 Ga. 96, 78 S.E.2d 26 (1953).

As against one who by fraud during the lifetime of deceased husband induced the latter to execute to him a deed to realty, equity will afford the widow, as personal representative, a remedy to cancel and set aside the deed and incidentally to preserve and apply rents issuing from such realty. *Ealy v. Tolbert*, 209 Ga. 575, 74 S.E.2d 867, later appeal, 210 Ga. 96, 78 S.E.2d 26 (1953).

Equity has jurisdiction to reform written instruments where there has been a mistake on the part of one of the parties, accompanied by fraud or inequitable conduct on the part of the other party, just as in cases where there is a mutual mistake. *Thompson v. Thompson*, 203 Ga. 128, 45 S.E.2d 632 (1947); *Wellborn v. Johnson*, 204 Ga. 389, 50 S.E.2d 16 (1948).

Petition contained sufficient allegations to show mistake on the part of the petitioner and fraud on the part of her own attorney, known to the attorney for the husband, and alleged a cause of action for reformation of contract between the parties and for modification of the judgment in the divorce suit accordingly. *Thompson v. Thompson*, 203 Ga. 128, 45 S.E.2d 632 (1947).

The general rule that an infant is bound by a judgment rendered in a suit in which he is represented by a next friend, to the same extent as though he were an adult, is subject to an exception in case of fraud, collusion, or like conduct on the part of the next friend, in which case the judgment may be set aside at the instance of the minor, even though it may be a consent judgment. *Nelson v. Estill*, 190 Ga. 235, 9 S.E.2d 73 (1940).

A decree adversely affecting the interests of minors, even though it be entered by

consent of their father as next friend, may, if induced by fraud, duress, or the like, be set aside at their instance in a proper proceeding, and for that purpose they may sue by their mother as next friend. *Nelson v. Estill*, 190 Ga. 235, 9 S.E.2d 73 (1940).

As between the original parties thereto, fraud in its procurement voids a contract, and this upon the theory that, the consent of the parties being necessary to the binding force of a contract, if one, apparently consenting by the execution of a written contract, can show that he did not in fact consent to its terms as therein expressed, but that his apparent consent was induced by false and fraudulent practices, by means of which he was overreached by the other party, and, without negligence upon his own part, really deceived as to the terms of the contract, he would be entitled to be relieved from its apparent obligations. *McKaig v. Hardy*, 196 Ga. 582, 27 S.E.2d 11 (1943).

Statute of Limitations

An action to cancel a fraudulent deed must be brought within seven years from the discovery of the fraud. *Harrison v. Holsenbeck*, 208 Ga. 410, 67 S.E.2d 311 (1951).

While a deed to land procured by fraud will not ripen into prescriptive title regardless of the period of time possession is held thereunder, yet an action to cancel such deed upon the ground that it was fraudulently procured must be brought within seven years from the time the fraud is discovered, and is barred thereafter. *Harrison v. Holsenbeck*, 208 Ga. 410, 67 S.E.2d 311 (1951).

Pleading and Practice

While fraud may not be presumed, being in itself subtle, slight circumstances may be sufficient to carry conviction of its existence. *Ringer v. Lockhart*, 240 Ga. 82, 239 S.E.2d 349 (1977).

Slight evidence of fraud and undue influence may authorize the jury to cancel the deed. *Harper v. Harper*, 229 Ga. 583, 193 S.E.2d 616 (1972).

It is incumbent upon a party who attempts to rescind a contract for fraud to repudiate it promptly upon discovery of the fraud. *Webb v. City of Atlanta*, 188 Ga. 485, 4 S.E.2d 154 (1939).

Possession retained by the vendor, after an absolute sale of real or personal property, is prima facie evidence of fraud, which may be explained, and after the possession is proven, the burden of explaining it rests upon those who claim under the sale. *Schoen v. Home Fed. Sav. & Loan*

Ass'n, 154 Ga. App. 68, 267 S.E.2d 466 (1980).

With proper pleadings and parties a judgment may be set aside in a court of law for fraud. *Benton v. State Hwy. Dep't.*, 220 Ga. 674, 141 S.E.2d 396 (1965).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Equity, § 20.

C.J.S. — 30 C.J.S., Equity, § 48.

ALR. — Relief as regards outstanding money obligation in action for damages for fraud in inducing contract, 3 ALR 74.

Right to recover back in an action at law money paid upon an existing judgment, procured by or grounded on fraud or mistake, 9 ALR 400.

Necessity of participation by the grantee or transferee in the fraud of the grantor or transferor in order to avoid a voluntary conveyance or transfer as against creditors, 17 ALR 728.

Necessity of exhausting remedies against other judgment debtor before bringing suit to set aside conveyance as fraudulent, 22 ALR 200.

Does right of grantor to maintain a suit in equity to set aside his conveyance for cause survive to his heir, 33 ALR 51.

Fraudulent misrepresentation or concealment by a contracting party concerning title to property or other subjects which are matters of public record, 33 ALR 853; 56 ALR 1217.

Right of one not in possession to maintain suit to remove cloud on title in case of fraud, 36 ALR 698.

Fraud or perjury in misrepresenting status or relationship essential to the judgment as ground of relief from, or injunction against, judgment, 49 ALR 1219.

Protection, as against third persons, of grantor tricked into delivering deed without getting cash payment contemplated, 57 ALR 759.

Wife in respect of her right to maintenance or alimony as within protection of statute or rule avoiding conveyances or transfers in fraud of creditors or persons to whom maker is under legal liability, 79 ALR 421.

Right to creditor to benefit of redemption from, acquisition or extinction of, outstanding right, title, or interest, by grantee or transferee in fraud of creditors, 87 ALR 830.

Criterion of extrinsic fraud as distinguished from intrinsic fraud, as regards relief from judgment on ground of fraud, 88 ALR 1201.

Principle which denies relief to party who has conveyed or transferred property in fraud of his creditors, as affected by execution, as part of, or as contemplated at time of, the fraudulent transaction, of reconveyance or retransfer of the property to him, 89 ALR 1166.

Trustee's, executor's, administrator's, or guardian's purchase from or sale to corporation of which he is an officer or stockholder, as voidable or as ground for surcharging his account, 105 ALR 449.

Avoidance on ground of fraud, mistake, duress, or mental incompetency of otherwise validly effected change of beneficiaries of insurance policies, 105 ALR 950.

Form and particularity of allegations to raise issue of undue influence, 107 ALR 832.

Return or tender of consideration for release or compromise as condition of action for rescission or cancellation, action upon original claim, or action for damages sustained by the fraud inducing the release or compromise, 134 ALR 6.

Right to set aside, for benefit of heirs and distributees, a conveyance or transfer by decedent in fraud of his creditors, 148 ALR 230.

Remedy available against invalid judgment in favor of United States, state, or other governmental unit immune to suit, 163 ALR 244.

Fraud predicated upon vendor's misrepresentation of physical condition of real property, 174 ALR 1010.

Concealment, misrepresentation, or mistake as regards identity of person for whom property is purchased as ground for cancellation of deed, 6 ALR2d 812.

Capacity of cotenant to maintain suit to set aside conveyance of interest of another cotenant because of fraud, undue influence, or incompetency, 7 ALR2d 1317.

Commitment of grantor to institution for insane as ground for setting aside conveyance in consideration of support, 18 ALR2d 906.

Venue of action to set aside as fraudulent conveyance of real property, 37 ALR2d 568.

Right of action for fraud, duress, or the like, causing instant plaintiff to release or compromise a cause of action against third person, 58 ALR2d 500.

Accountability and liability for rents and

profits of grantee of fraudulently conveyed real property, 60 ALR2d 593.

Disqualification of arbitrator by court or stay of arbitration proceedings prior to award, on ground of interest, bias, prejudice, collusion, or fraud of arbitrators, 65 ALR2d 755.

Conveyance as fraudulent where made in contemplation of possible liability for future tort, 38 ALR3d 597.

Corporation's measure of recovery against promoter who has made secret profit in sale of property to corporation, 84 ALR3d 162.

Wills: challenge in collateral proceeding to decree admitting will to probate, on ground of fraud inducing complainant not to resist probate, 84 ALR3d 1119.

Action based upon reconveyance, upon promise of reconciliation, of property realized from divorce award or settlement, 99 ALR3d 1248.

ARTICLE 4

ACCOUNTING OF FUNDS, GOODS, ETC.

23-2-70. Scope of equity jurisdiction over matters of account.

Equity jurisdiction over matters of account shall extend to:

- (1) Mutual accounts growing out of privity of contract;
- (2) Cases where accounts are complicated and intricate;
- (3) Cases where a discovery or writ of ne exeat is prayed and granted;
- (4) Cases where the account is of a trust fund;
- (5) Accounts between partners or tenants in common; and
- (6) Cases where a multiplicity of actions would render a trial difficult, expensive, and unsatisfactory at law. (Orig. Code 1863, § 3063; Code 1868, § 3075; Code 1873, § 3130; Code 1882, § 3130; Civil Code 1895, § 3989; Civil Code 1910, § 4586; Code 1933, § 37-301.)

Law reviews. — For article, "Some Problems in Providing for Nonjudicial

Settlement of the Trustee's Accounts," see 3 Ga. St. B.J. 417 (1967).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

MUTUAL ACCOUNTS

COMPLICATED AND INTRICATE ACCOUNTS

TRUST FUND ACCOUNT

PARTNERS OR TENANTS IN COMMON

MULTIPLICITY OF ACTIONS

General Consideration

An accounting may be had at law. — The mere necessity of accounting to ascertain the amount due on a contract is insufficient to give equity jurisdiction to order an accounting. *Insurance Center, Inc. v. Hamilton*, 218 Ga. 597, 129 S.E.2d 801 (1963).

Therefore, an equitable accounting is not a proceeding to which every litigant has a right. It is granted only in carefully prescribed and determined circumstances, such as when an accounting at law is inadequate, and when the relationships and dealings between the parties are as set forth in this section. *Herring v. Standard Guar. Ins. Co.*, 238 Ga. 261, 232 S.E.2d 544 (1977).

An equitable accounting is evidentiary in nature but the determination that an equitable accounting will be ordered is an interlocutory or preliminary matter separate and distinct from the equitable accounting itself. *Herring v. Standard Guar. Ins. Co.*, 238 Ga. 261, 232 S.E.2d 544 (1977).

This section contemplates only petitions in equity involving the traditional filing of the action and the issuance and service of process. *Bodrey v. Bodrey*, 225 Ga. 822, 171 S.E.2d 614 (1969), rev'd on other grounds sub nom. *Wiley v. Wiley*, 233 Ga. 824, 213 S.E.2d 682 (1975).

Hence, equity does not have jurisdiction merely because the application for partition prays for an accounting as to common grantors where there was no filing of an action and summons and process. *Bodrey v. Bodrey*, 225 Ga. 822, 171 S.E.2d 614 (1969), rev'd on other grounds sub nom. *Wiley v. Wiley*, 233 Ga. 824, 213 S.E.2d 682 (1975).

Where a fiduciary relation exists, an accounting in equity is proper. *Atlanta Trust Co. v. National Bondholders Corp.*, 188 Ga. 761, 4 S.E.2d 644 (1939).

So, where petitioners, remainder legatees under their mother's will, sued defendant in three different capacities, namely, as trustee for the life estate under the will, as executrix, and as an individual, seeking an injunction against the sale of realty of the estate, partition, judgment, an accounting, and other and further relief, petitioners were entitled to an accounting. *Matson v. Crowe*, 193 Ga. 578, 19 S.E.2d 288 (1942).

In a proceeding to obtain an accounting, the complainant is not obliged to show how much is due, provided he avers facts sufficient to indicate that something will be found to be due him by the defendant. *Atlanta Trust Co. v. National Bondholders Corp.*, 188 Ga. 761, 4 S.E.2d 644 (1939).

An injunction may be granted to continue during an accounting. *Henderson v. Turner*, 36 Ga. 263 (1867).

Action for accounting pending in court of law not automatically subject to injunction by filing equitable action. — Where it appears from a petition praying for an accounting that there was pending in another court an action by the corporate defendant against the plaintiff, such court being empowered to render an accounting between the parties, and no special reason being set out why a court of equity should assume jurisdiction for such purpose, equity will not enjoin the proceedings and processes of a court of law in the absence of some intervening equity or other proper defense of which the party, without fault on his part, cannot avail himself at law. *Peebles v. Peebles*, 193 Ga. 358, 18 S.E.2d 629 (1942).

There must be some special reason why a court proceeding in equity should take charge of an action where an accounting is requested, the petition must show, and this means more than the mere assertion of a conclusion, some reason why the remedy at law is inadequate. *Peeples v. Peeples*, 193 Ga. 358, 18 S.E.2d 629 (1942).

When transfer of accounting case from Supreme Court to Court of Appeals mandatory. — A suit for an accounting case, on appeal, must be transferred to the Court of Appeals from the Supreme Court, where the alleged facts show no unusual complication in the transactions or other ground for equitable relief additional to the relief which might be afforded by an accounting and judgment at law. *Universal Garage Co. v. Fowler*, 184 Ga. 604, 192 S.E. 299 (1937).

Cited in *McLaren v. Steapp*, 1 Ga. 376 (1846); *Napier v. Napier*, 6 Ga. 404 (1849); *Shivers v. Palmer*, 14 Ga. 342 (1853); *McRarey v. Huff*, 32 Ga. 681 (1861); *Dill v. McGehee*, 34 Ga. 438 (1886); *McDonald v. Davies*, 43 Ga. 356 (1871); *Wilson & Co. v. Riddle*, 48 Ga. 609 (1873); *Sloan v. Cooper*, 54 Ga. 486 (1875); *Epping v. Aiken*, 71 Ga. 682 (1883); *Neel v. Morris*, 73 Ga. 406 (1884); *Gould v. Barrow*, 117 Ga. 458, 43 S.E. 702 (1903); *Allen v. Grant*, 122 Ga. 552, 50 S.E. 494 (1905); *Houston v. Polk*, 124 Ga. 103, 52 S.E. 83 (1905); *McArthur v. Jordan*, 139 Ga. 304, 77 S.E. 150 (1913); *Greer v. Jackson*, 146 Ga. 376, 91 S.E. 417 (1917); *McKey v. Wright*, 147 Ga. 662, 95 S.E. 217 (1918); *Central of Ga. Ry. v. Wright*, 148 Ga. 86, 95 S.E. 963 (1918); *Burress v. Montgomery*, 148 Ga. 548, 97 S.E. 538 (1918); *Mathewson v. Reed*, 149 Ga. 217, 99 S.E. 854 (1919); *Payne v. West Point Whsle. Grocery Co.*, 151 Ga. 46, 105 S.E. 608 (1921); *Pickens v. Jackson*, 152 Ga. 100, 108 S.E. 536 (1921); *Goolsby v. Board of Drainage Comm'rs*, 156 Ga. 213, 119 S.E. 644 (1923); *Arthur Tufts Co. v. DeJarnette Supply Co.*, 158 Ga. 85, 123 S.E. 16 (1924); *Thigpen v. Aldred*, 175 Ga. 120, 165 S.E. 27 (1932); *City of Macon v. Ries*, 179 Ga. 320, 176 S.E. 21 (1934); *New Winder Lumber Co. v. Guest*, 182 Ga. 859, 187 S.E. 63 (1936); *Kennedy v. Howard*, 183 Ga. 410, 188 S.E. 673 (1936); *Grimmett v. Barnwell*, 184 Ga. 461, 192 S.E. 191 (1937); *Henderson v. Curtis*, 185

Ga. 390, 195 S.E. 152 (1938); *Reynolds v. Hyers*, 190 Ga. 200, 9 S.E.2d 78 (1940); *Park v. Park*, 37 F. Supp. 185 (N.D. Ga. 1941); *O'Rear v. Lamb*, 194 Ga. 455, 22 S.E.2d 74 (1942); *Clement A. Evans & Co. v. Waggoner*, 197 Ga. 857, 30 S.E.2d 915 (1944); *Martin v. Home Owners Loan Corp.*, 198 Ga. 288, 31 S.E.2d 407 (1944); *Clark v. Bandy*, 198 Ga. 564, 32 S.E.2d 245 (1944); *Fulmer v. Wilkins*, 201 Ga. 322, 39 S.E.2d 405 (1946); *Walker Electrical Co. v. Walton*, 203 Ga. 246, 46 S.E.2d 184 (1948); *Regents of Univ. Sys. v. Carroll*, 203 Ga. 292, 46 S.E.2d 496 (1948); *Ballenger v. Houston*, 207 Ga. 438, 62 S.E.2d 189 (1950); *West View Corp. v. Thunderbolt Yacht Basin, Inc.*, 208 Ga. 93, 65 S.E.2d 167 (1951); *Cashin v. Markwalter*, 208 Ga. 444, 67 S.E.2d 226 (1951); *Gaulding v. Courts*, 210 Ga. 527, 81 S.E.2d 460 (1954); *Adams v. McGehee*, 211 Ga. 498, 86 S.E.2d 525 (1955); *Johnson v. Wilson*, 212 Ga. 264, 91 S.E.2d 758 (1956); *Kirchman v. Kirchman*, 212 Ga. 488, 93 S.E.2d 685 (1956); *Douglas-Guardian Whse. Corp. v. Todd*, 212 Ga. 791, 96 S.E.2d 275 (1957); *Springs v. Bulloch*, 213 Ga. 164, 97 S.E.2d 582 (1957); *Harrison v. Harrison*, 214 Ga. 393, 105 S.E.2d 214 (1958); *Mendenhall v. Kingloff*, 215 Ga. 726, 113 S.E.2d 449 (1960); *Gandy v. Robinson Co.*, 216 Ga. 190, 115 S.E.2d 341 (1960); *Edwards v. United Stone & Allied Prods. Workers of America*, 220 Ga. 183, 137 S.E.2d 632 (1964); *Rogers v. Griggs*, 134 Ga. App. 528, 215 S.E.2d 291 (1975).

Mutual Accounts

Mutual accounts may be setoff at law by § 13-7-4 although equity has jurisdiction under this section. *Hardin v. Stanton*, 14 Ga. App. 299, 80 S.E. 698 (1914).

An agent must account to his principal where he has sold unknown quantities of goods to third persons. *Mitchem v. Georgia Cotton Oil Co.*, 139 Ga. 519, 77 S.E. 627 (1913).

Complicated and Intricate Accounts

Facts rendering equitable accounting proper. — The life tenant having sustained a fiduciary relationship to the plaintiff, a remainderman, and the subject matter of the accounting being shown to be complicated because of the life tenant confusing

and commingling her own funds with the money which upon her death became part of the remainder estate, the accounting, properly granted, is an equitable accounting. *Perkins v. First Nat'l Bank*, 221 Ga. 82, 143 S.E.2d 474 (1965).

Trust Fund Account

Remedy when trustee's funds commingled with trust funds. — Where a trustee has so mingled the trust funds with his own estate that they cannot be distinguished, a cestui que trust may bring a bill in equity to reach the trustee's interest. *Evans v. Pennington*, 50 Ga. App. 146, 177 S.E. 357 (1934).

Partners or Tenants in Common

A court of equity has jurisdiction in all cases of an accounting and settlement between partners. *Smith v. Hancock*, 163 Ga. 222, 136 S.E. 52 (1926).

An accounting without dissolution will be granted where one partner refuses to allow another to participate in the business. *Hogan v. Walsh*, 122 Ga. 283, 50 S.E. 84 (1905); *Zerounis v. Berry*, 199 Ga. 410, 34 S.E.2d 275 (1945).

A prayer that one partner be compelled to pay another one-half of the net profit of the business includes a prayer for accounting. *Bennett v. Woolfolk*, 15 Ga. 213 (1854).

Depreciation of assets subsequent to the dissolution must be borne by the partnership. *Houston v. Polk*, 124 Ga. 103, 52 S.E. 83 (1905).

Partners may have a receiver appointed to settle the partnership affairs. *Bennett v. Smith*, 108 Ga. 466, 34 S.E. 156 (1899).

The waiver of discovery by a partner is immaterial. *Huger v. Cunningham*, 126 Ga. 684, 56 S.E. 64 (1906).

When equitable action not maintainable. — Where the plaintiff contends all partnership relations between the plaintiff and the defendant have come to an end, that a balance has been struck, and that an indebtedness is allegedly due by the defendant to the plaintiff, which cannot be affected by any transactions between the partnership and its creditors or debtors, this is not an equitable action by a member of a firm against his copartner, but an action of law, one man against another

who had formerly been his partner, upon an indebtedness a part of which grew out of the formerly existing partnership between them. *Manry v. Hendricks*, 192 Ga. 319, 15 S.E.2d 434 (1941).

Hence, action for accounting not tenable in equity. — Where the partnership has been fully dissolved by written contract and the rights of each party definitely established, in case of a breach of such contract equity will not order an accounting, as the remedy is at law. *Manry v. Hendricks*, 192 Ga. 319, 15 S.E.2d 434 (1941).

Where an accounting is involved a city court is without jurisdiction. *Dixon v. Hyde*, 25 Ga. App. 84, 102 S.E. 910 (1920).

Cotenant may be compelled in equity to account to another for a just share of the profits. *Huff v. McDonald*, 22 Ga. 131, 68 Am. Dec. 487 (1857).

Equity has concurrent jurisdiction with courts of law, over matters of account between tenants in common, and when asserted, a court will hold and exercise equitable jurisdiction for the purpose of settling all the equities between the tenants, growing out of the tenancy in common. *Bailey v. Bell*, 209 Ga. 566, 74 S.E.2d 881 (1953).

A case in equity is presented by a petition which not only embraces a statutory application for partition, but also prays for an accounting from cotenants for rents and profits. *Werner v. Werner*, 196 Ga. 1, 25 S.E.2d 676 (1943).

Exercise by the superior court of its equity jurisdiction to fully and adequately resolve all issues between tenants in common would not be an interference with the orderly administration of estate. *Evans v. Little*, 246 Ga. 219, 271 S.E.2d 138 (1980).

When action for partitioning and accounting proper. — Where a number of cotenants are in possession of all of the common property, and are collecting the rents and profits thereof, an equitable action for partitioning and accounting by those not in possession of the property is a proper remedy. *Bailey v. Bell*, 209 Ga. 566, 74 S.E.2d 881 (1953).

Accounting between cotenants for a just share of the profits is applicable where a partition of the land is granted. *Turnbull v. Foster*, 116 Ga. 765, 43 S.E. 42 (1902).

A court may entertain a partition proceeding without trying first, or in connection therewith, a suit for accounting concerning the same property held in cotenancy. *Lankford v. Milhollin*, 200 Ga. 512, 37 S.E.2d 197 (1946).

And it is within the power of the court to order a sale of the common property prior to the trial of the main accounting suit. Whether such partition proceeding is heard before the trial of the suit for accounting is a matter resting within the sound discretion of the court. *Lankford v. Milhollin*, 200 Ga. 512, 37 S.E.2d 197 (1946).

While equity jurisdiction ceases where the Legislature gives a specific remedy at law, and while a specific legal remedy for partition is provided by Subpart 2, Part 2, Art. 7, Ch. 6, T. 44, and under § 44-6-140 equity will not ordinarily take cognizance of a partition proceeding unless the remedy at law is insufficient, or peculiar circumstances render the proceeding in equity more suitable and just, accounting between tenants in common will alone and of itself give a court of equity jurisdiction of a partition proceeding, whether or not there are other peculiar circumstances which render the proceeding in equity more suitable and just. *Mills v. Williams*, 208 Ga. 425, 67 S.E.2d 212 (1951).

Counterclaim for partition by sale proper. — Where a tenant-in-common sues his cotenant for an accounting and for rents and profits, and a cross action (now counterclaim) is filed by the latter for partition by sale of the common property, such cross action (now counterclaim) is germane to the original action, and the court may direct partition by sale where it appears that the common property cannot be fairly and equitably divided by metes and bounds and it is proper for the decree to direct that the funds be held in court pending the trial of the action for accounting. *Lankford v. Milhollin*, 200 Ga. 512, 37 S.E.2d 197 (1946).

Accessory to misapplication of trust funds accountable to injured person. — One who aids and assists a trustee in misapplying trust funds, with knowledge of his misconduct, is directly accountable to the person injured by such misapplication, even though the person thus assisting the

trustee does not himself reap the fruits of the misappropriation. *Atlanta Trust Co. v. National Bondholders Corp.*, 188 Ga. 761, 4 S.E.2d 644 (1939).

And the person injured by the misconduct may join in one suit the person occupying the fiduciary relationship and one who aids and assists him in misapplying trust assets. *Atlanta Trust Co. v. National Bondholders Corp.*, 188 Ga. 761, 4 S.E.2d 644 (1939).

Some evidence admissible in accounting action. — In an action for accounting and other relief between joint owners of property, tax receipts tending to show that one of the owners had paid the tax on the joint property for certain years were admissible. *Head v. Lee*, 203 Ga. 191, 45 S.E.2d 666 (1947).

Effect of consent decree on equitable action between cotenants. — Where one tenant in common brings an equitable action against his cotenants for partition of land and for an accounting of rents, issues, and profits, and a consent decree is taken, fixing the rights and liabilities of the parties as between themselves, and decreeing their respective interests in the land, in the further progress of the case, where the decree is not attacked, the parties will not be permitted to go behind the decree so as to reopen the subject. All prior agreements and controversies between the parties, whether such were expressly pleaded or not, are merged in the decree. *Johnson v. James*, 246 Ga. 680, 272 S.E.2d 692 (1980).

Multiplicity of Actions

Equitable jurisdiction not grounded on avoidance of multiplicity of actions alone. — While avoidance of a multiplicity of actions, in a proper case, may be considered as an independent ground of equitable jurisdiction, and not a mere auxiliary to other equities present, it does not alone create an equitable cause of action, regardless of other circumstances. *Dobbs v. Federal Deposit Ins. Corp.*, 187 Ga. 569, 1 S.E.2d 672 (1939).

Consolidation of actions seeking equitable accounting warranted. — Where the issue in dispossessory warrant and distress warrant proceedings is the same, to wit: does the lessee in those cases owe any rent to the lessor therein? and where a third

case involves the same lease contract, the same parties, and the same claims for rent, and the lessee's petition asserts a defense to the lessor's claims on the ground that, upon an equitable accounting, it will be found that the lessee does not owe the lessor any

sum as rent, but that on the contrary the lessor is liable to the lessee, and the lease contract has not terminated, the three cases should be consolidated. *West View Corp. v. Thunderbolt Yacht Basin, Inc.*, 208 Ga. 93, 65 S.E.2d 167 (1951).

RESEARCH REFERENCES

Am. Jur. 2d. — 1 Am. Jur. 2d, Accounts and Accounting, § 50.

ALR. — Rights of cotenants inter se as to timber, 2 ALR 993; 41 ALR 582.

Avoidance of multiplicity of suits as ground of jurisdiction in equity of a suit by one out of possession to quiet title against persons in possession of different portions of the land in severalty, 30 ALR 109.

Accounting in equity in case of tort, 53 ALR 815.

Right of owner of property to maintain bill for accounting against lien holder or pledgee, 79 ALR 201.

Propriety of suit in equity by or against several insurers under fire policies covering same risk, 98 ALR 181.

Previous demand for, and refusal of, an accounting, as condition of actions of

account or for an accounting, 143 ALR 1211.

Availability of equitable remedy of accounting between principal and agent, 3 ALR2d 1310.

Delay as defense to action for accounting between joint adventurers, 13 ALR2d 765.

Equity jurisdiction to determine valuation, where arbitration or appraisal has failed, under long-term lease providing for appraisal of premises and fixing rental value at stated intervals, 26 ALR2d 744.

Right of partner or joint adventurer to accounting where firm business or transactions are illegal, 32 ALR2d 1345.

Right to accounting between attorneys associated in practice, in absence of formal partnership, 81 ALR2d 1420.

23-2-71. Entitlement to contribution; when equity has jurisdiction.

In cases of joint, joint and several, or several liabilities of two or more persons, where all are equally bound to bear the common burden and one has paid more than his share, he shall be entitled to contribution from the others; and whenever the circumstances are such that an action at law will not give a complete remedy, equity may entertain jurisdiction. (Orig. Code 1863, § 3065; Code 1868, § 3077; Code 1873, § 3132; Code 1882, § 3132; Civil Code 1895, § 3991; Civil Code 1910, § 4588; Code 1933, § 37-303.)

Cross references. — As to right to contribution among joint trespassers, see § 51-12-32.

Law reviews. — For note, "Contribution Among Joint Tortfeasors," see 12 Ga. L. Rev. 553 (1978).

JUDICIAL DECISIONS

Enforcement of execution to compel contribution from joint defendants. — Joint defendants who have paid an execution against themselves and others, and procured a written transfer of it from the plaintiff in fi. fa., may enforce the execution against other defendants for contribution. *Miller v. Perkerson*, 128 Ga. 465, 57 S.E. 787 (1907).

An agreement between the parties may absolve one of them from any duty to contribute. *Chattahoochee Brick Co. v. Braswell*, 92 Ga. 631, 18 S.E. 1015 (1893).

While the doctrine of contribution originated in courts of equity, it was subsequently adopted by courts of law and is now universally applied therein. In order to make the doctrine consistent with the forms, theories, and practices of courts of law, the fiction of an implied contract by one obligor to contribute to another coobligor who had been compelled to pay the whole obligation was adopted. *Watkins v. Woodbery*, 148 Ga. 249, 96 S.E. 338 (1918); *Powell v. Powell*, 171 Ga. 840, 156 S.E. 677 (1931), later appeal, 179 Ga. 817, 117 S.E. 566 (1934); *Black v. Davidson*, 65 Ga. App. 780, 16 S.E.2d 525 (1941); *Horton v. Continental Cas. Co.*, 72 Ga. App. 594, 34 S.E.2d 605 (1945); *Southern Ry. v. State Farm Mut. Auto. Ins. Co.*, 357 F. Supp. 810 (N.D. Ga. 1972), aff'd, 477 F.2d 49 (5th Cir. 1973).

An actual assignment of the right to enforce contribution may be made. *Hall v. Harris*, 6 Ga. App. 822, 65 S.E. 1086 (1909).

Successive purchasers of a mortgagor's estate are not liable to contribution among themselves. *Cumming v. Cumming*, 3 Ga. 460 (1847).

Equitable relief to secure a waiver of homestead contained in a note paid by a joint obligor will be granted. *Sherling v. Long*, 122 Ga. 797, 50 S.E. 935 (1905).

There is no line of separation between the liability of joint tort-feasors. — The tort is a thing integral and indivisible, and any claim for injuries arising therefrom runs through and embraces every part of the tort. The liability of one cannot be carried into any portion of the joint tort that is not followed by an equal liability of

the other tort-feasor. *Eidson v. Maddox*, 195 Ga. 641, 24 S.E.2d 895 (1943).

The petition must allege that the debt has been paid. *Huey v. Stewart*, 69 Ga. 768 (1882).

And, it does not lie in the mouth of petitioner to claim contribution when it has paid nothing upon the alleged joint obligation. *Autry v. Southern Ry.*, 167 Ga. 136, 144 S.E. 741 (1928).

However, it is unnecessary to show that a common debt has been paid in full either by the plaintiff or by any other person. In some decisions there are expressions which might imply that the whole debt must be paid before an action for contribution will lie, but such was not the rule at common law, nor is there any such requirement under this Code. *Herrington v. Wimberly*, 177 Ga. 536, 170 S.E. 670 (1933).

Prerequisite to contribution. — Before one is entitled to contribution as an affirmative remedy, he must show not only a common liability, but payment by him of more than his share. *Snyder v. Elkan*, 187 Ga. 164, 199 S.E. 891 (1938).

When right to contribution arises. — When a principal obligor with his own funds pays a joint debt due by him and a coprincipal, the right of the former upon the implied contract of the latter to bear his share of the common burden arises when the one paying the joint debt extinguishes the debt of their common debtor. *Powell v. Powell*, 171 Ga. 840, 156 S.E. 677 (1931), later appeal, 179 Ga. 817, 177 S.E. 566 (1934).

Period of limitation applicable to an action for contribution based upon an implied contract is four years from the time the right of action accrues. *Sherling v. Long*, 122 Ga. 797, 50 S.E. 925 (1905); *Powell v. Powell*, 171 Ga. 840, 156 S.E. 677 (1931), later appeal, 179 Ga. 817, 177 S.E. 566 (1934).

Even after the dissolution of a partnership, the statute of limitations does not begin to run in favor of one partner against another until the partnership affairs, as to debtors and creditors of the firm, have been wound up and settled, or, at least, a sufficient time has elapsed since the dissolution to raise the presumption that such

was the fact, nor, while there are outstanding assets and liabilities, will a partner be barred as against his copartner on the principle of stale demands. *Powell v. Powell*, 171 Ga. 840, 156 S.E. 677 (1931), later appeal, 179 Ga. 817, 177 S.E. 566 (1934).

The principle of contribution is equality in bearing a common burden. *Eidson v. Maddox*, 195 Ga. 641, 24 S.E.2d 895 (1943); *Horton v. Continental Cas. Co.*, 72 Ga. App. 594, 34 S.E.2d 605 (1945); *Williams Bros. Lumber Co. v. Anderson*, 210 Ga. 198, 78 S.E.2d 612 (1953).

The doctrine of contribution is not founded upon contract, but upon principles of equity, and assists in the fair and just division of losses, preventing unfairness and injustice. *Horton v. Continental Cas. Co.*, 72 Ga. App. 594, 34 S.E.2d 605 (1945).

Rule doctrine of contribution based on. — The general rule is that one who is compelled to pay or satisfy the whole or to bear more than his just share of a common burden or obligation, upon which several persons are equally liable or which they are bound to discharge, is entitled to contribution against the others to obtain from them payment of their respective shares. *Eidson v. Maddox*, 195 Ga. 641, 24 S.E.2d 895 (1943); *Horton v. Continental Cas. Co.*, 72 Ga. App. 594, 34 S.E.2d 605 (1945).

Coobligors on notes or other obligations for payment of money are equally bound, and must equally contribute to the discharge of such an obligation, and one of the joint makers who pays more than his share of the obligation may enforce contribution from any of his joint obligors who fails or refuses to discharge his aliquot proportion of the joint liability, but inequality of benefits or interest between coobligors may destroy equality of contribution between them, and a variance between the amounts of their primary liability to the common creditor may have the same effect; thus, where the several coobligors on a promissory note receive different amounts on account of the note, they are liable to contribute, not equally, but in proportion to the amount received by each of them. *Davis v. Perkins*, 178 Ga. 195, 172 S.E. 562 (1934).

A joint obligor is not subrogated in law to the rights of the creditors as against his coobligor for contribution. He merely has a right of contribution under this section. *Sherling v. Long*, 122 Ga. 797, 50 S.E. 935 (1905).

A continuance granted to one joint obligor enures to all. *Medlock v. Wood*, 4 Ga. App. 368, 61 S.E. 516 (1908).

Contribution among joint tort-feasors is enforceable where one has paid more than his pro rata share of a judgment. *Southern Ry. v. State Farm Mut. Auto. Ins. Co.*, 357 F. Supp. 810 (N.D. Ga. 1972), *aff'd*, 477 F.2d 49 (5th Cir. 1973).

The doctrine of contribution can be applied against the insurer of a joint tort-feasor. *Southern Ry. v. State Farm Mut. Auto. Ins. Co.*, 357 F. Supp. 810 (N.D. Ga. 1972), *aff'd*, 477 F.2d 49 (5th Cir. 1973).

An indemnitor or insurer of one joint tort-feasor, upon discharging the common liability, succeeds to the right to recover contribution from other joint tort-feasors, or their indemnitors, or insurers. *Southern Ry. v. State Farm Mut. Auto. Ins. Co.*, 357 F. Supp. 810 (N.D. Ga. 1972), *aff'd*, 477 F.2d 49 (5th Cir. 1973).

The right of contribution extends equally to actions ex contractu and actions ex delicto, where all are equally bound to bear the common burden, and one has paid more than his share. *Southern Ry. v. City of Rome*, 179 Ga. 449, 176 S.E. 7 (1934); *City of Rome v. Southern Ry.*, 50 Ga. App. 185, 177 S.E. 520 (1934); *Horton v. Continental Cas. Co.*, 72 Ga. App. 594, 34 S.E.2d 605 (1945); *Goldhill v. Kramer*, 122 Ga. App. 39, 176 S.E.2d 232 (1970).

Contribution unrestricted. — The permission to have contribution "where all are equally bound to bear the common burden, and one has paid more than his share," is absolutely unrestricted. *Southern Ry. v. City of Rome*, 179 Ga. 449, 176 S.E. 7 (1934); *Horton v. Continental Cas. Co.*, 72 Ga. App. 594, 34 S.E.2d 605 (1945).

Contribution has been defined to be a payment made by each, or by any, or several having a common interest of liability of his share in the loss suffered, or in the money necessarily paid by one of the parties in behalf of the others. It is the right of one who has discharged a common liabil-

ity or burden to recover of another also liable the aliquot portion which he ought to pay or bear. *Eidson v. Maddox*, 195 Ga. 641, 24 S.E.2d 895 (1943).

In case of insolvency of a surety the solvent sureties must bear equally the burden of payment. *Todd v. Windsor*, 118 Ga. App. 805, 165 S.E.2d 438 (1968).

There is no authority which allows a cosurety to convert his action for contribution into something else merely by founding his action on the original evidence of indebtedness. It is still a suit to enforce contribution from cosureties, and plaintiff is bound by the substantive rules pertaining to contribution. *Todd v. Windsor*, 118 Ga. App. 805, 165 S.E.2d 438 (1968).

It is not some independent right but the right to contribution which is being enforced, and it is an action on the original evidence of indebtedness by way of subrogation to the creditor's remedy which is allowed to the surety merely as a form of action in aid of the right to contribution from cosureties. *Todd v. Windsor*, 118 Ga. App. 805, 165 S.E.2d 438 (1968).

Sureties' liability for contribution several and not joint. — Since the substantive right and liability being enforced is that of contribution between coobligors, each is liable only for an equal proportionate share of the debt. This liability is several and not joint, and a joint obligor who has paid the joint obligation is entitled to judgment against each of his coobligors only for the proportion for which each is liable; judgment should not be entered against any one of them or against all of them jointly for the aggregate amount due from them. *Todd v. Windsor*, 118 Ga. App. 805, 165 S.E.2d 438 (1968).

Hence, surety cannot obtain a joint and general judgment against cosureties for contributions. — There is no authority for the proposition that a surety or other coobligor, however he may find his action for contribution, may obtain a joint and several judgment against his several cosureties for the aggregate amount due him. *Todd v. Windsor*, 118 Ga. App. 805, 165 S.E.2d 438 (1968).

Contribution limited to proportionate share of whole obligation. — If there be several guarantors, some of whom have

paid off the obligation, their right against the remaining guarantors, or persons secondarily liable, is only for contribution as to the proportionate share of the whole. *Auerback v. Maslia*, 142 Ga. App. 184, 235 S.E.2d 594 (1977).

When contribution against tort-feasors not available. — Where separate judgments are entered against tort-feasors whose concurrent, independent negligence results in damage to the plaintiff's property, the verdict and judgment against each tort-feasor adjudicates the amount of his liability. In such circumstances there is no right of contribution between the tort-feasors. The right of contribution under the law is based upon one party bearing more than his share of "a common burden." *Hardwick v. Georgia Power Co.*, 100 Ga. App. 38, 110 S.E.2d 24 (1959).

And, when contribution not available in partnership. — Where the business of a copartnership entails loss and where no part of the copartnership debts has been paid, no right of contribution arises, and no right to setoff partnership liabilities against a suit on a note by one of the partners against the other partners. *Brinson v. Franklin*, 177 Ga. 727, 171 S.E. 287 (1933).

Cited in *Edge v. Edge*, 62 Ga. 289 (1879); *Neel v. Morris*, 73 Ga. 406 (1884); *Hall v. Harris*, 6 Ga. App. 822, 65 S.E. 1086 (1909); *Miller v. Jones*, 136 Ga. 428, 71 S.E. 910 (1911); *Ward v. Fleming*, 18 Ga. App. 128, 88 S.E. 899 (1916); *Watkins v. Woodbery*, 24 Ga. App. 80, 100 S.E. 34 (1919); *Walker v. Industrial Stores Co.*, 37 Ga. App. 448, 140 S.E. 519 (1927); *Rome Ry. & Light Co. v. Southern Ry.*, 42 Ga. App. 786, 157 S.E. 527 (1931); *Federal Land Bank v. Farmers' & Merchants' Bank*, 177 Ga. 505, 170 S.E. 504 (1933); *Gazaway v. Nicholson*, 190 Ga. 345, 9 S.E.2d 154 (1940); *Chapman v. Lamar-Rankin Drug Co.*, 64 Ga. App. 493, 13 S.E.2d 734 (1941); *Rose v. Crane Heating Co.*, 198 Ga. 295, 31 S.E.2d 717 (1944); *Southeastern Erection Co. v. Flagler Co.*, 108 Ga. App. 831, 134 S.E.2d 822 (1964); *Whiddon v. Forshee*, 228 Ga. 133, 184 S.E.2d 349 (1971); *Chastain v. Simmons*, 142 Ga. App. 615, 236 S.E.2d 678 (1977); *Sturdivant v. Chapman*, 146 Ga. App. 26, 245 S.E.2d 311 (1978); *Rambo v. Cobb Bank & Trust Co.*, 146 Ga. App. 204, 245 S.E.2d 888 (1978).

RESEARCH REFERENCES

Am. Jur. 2d. — 18 Am. Jur. 2d, Contribution, §§ 33, 35.

C.J.S. — 18 C.J.S., Contribution, § 1 et seq.

ALR. — Release of one of several joint or joint and several contract obligors as affecting liability of other obligors, 53 ALR 1420.

Proportion of obligation enforceable by way of contribution between joint obligors, 64 ALR 213.

Right of owner of property to maintain bill for accounting against lien holder or pledgee, 79 ALR 201.

May acts of independent tort-feasors, each of which alone causes or tends to produce some damage, be combined to create a joint liability, 91 ALR 759.

Judgment for plaintiff in action in tort or contract against codefendants, as conclusive in subsequent action between codefendants as to the liability of both or the liability of one and nonliability of the other, 101 ALR 104; 142 ALR 727.

Right as between employer primarily responsible under Workmen's Compensation Act and employer secondarily liable under that act (or their insurers) where injury was due to latter's negligence, 117 ALR 571.

Cotenant's right to contribution in respect of taxes, improvements, or repairs as subject to reduction on account of rents and profits for which he is not otherwise responsible, 136 ALR 1022.

Right of one cojudgment debtor who

pays judgment to be subrogated thereto as against the other cojudgment debtors, 157 ALR 495.

Right of tort-feasor to contribution where judgment creditor is spouse, parent, child, etc., of other tort-feasor against whom contribution is sought, 19 ALR2d 1003.

Uniform Contribution Among Tort-feasors Act, 34 ALR2d 1107.

Right of tort-feasor initially causing injury to recover indemnity or contribution from medical attendant causing new injury or aggravating injury in course of treatment, 8 ALR3d 639.

Products liability: right of manufacturer or seller to contribution or indemnity from user of product causing injury or damage to third person, and vice versa, 28 ALR3d 943.

Right of guarantor or surety, in order to avoid paying amount in excess of his proportionate share, to compel coguarantors or cosureties to pay their share to creditor, 38 ALR3d 680.

Voluntary payment into court of judgment against one joint tort-feasor as release of others, 40 ALR3d 1181.

Validity and effect of "loan receipt" agreement between injured party and one tort-feasor, for loan repayable to extent of injured party's recovery from a cotort-feasor, 62 ALR3d 1111.

Propriety of direction of verdict in favor of fewer than all defendants at close of plaintiff's case, 82 ALR3d 974.

23-2-72. Apportionment of contract, rent, or hire.

Apportionment of a contract or of rent or hire may, from peculiar circumstances rendering the common-law remedy incomplete, become the subject of equitable jurisdiction. (Orig. Code 1863, § 3067; Code 1868, § 3079; Code 1873, § 3134; Code 1882, § 3134; Civil Code 1895, § 3993; Civil Code 1910, § 4590; Code 1933, § 37-305.)

JUDICIAL DECISIONS

Cited in *Osborn v. Herron*, 28 Ga. 313 (1859).

RESEARCH REFERENCES

C.J.S. — 18 C.J.S., Contribution, § 1 et seq.

ALR. — Right of owner of property to maintain bill for accounting against lien holder or pledgee, 79 ALR 201.

Statute providing for apportionment between lessor and lessee of a tax imposed upon the producer of oil, gas, or other natural production as violation of the constitutional provision against impair-

ment of the obligation of contracts, 160 ALR 980.

Equity jurisdiction to determine valuation, where arbitration or appraisal has failed, under long-term lease providing for appraisal of premises and fixing rental value at stated intervals, 26 ALR2d 744.

Validity, construction, and application of entirety clause in oil or gas lease, 48 ALR3d 706.

23-2-73. Discharge of encumbrances affecting several interests.

Where several persons are interested in an estate as tenants for years, or for life, or in remainder or reversion, and encumbrances are to be discharged, the equitable division of the burden, according to the several interests, shall be a question for equitable interference. (Orig. Code 1863, § 3066; Code 1868, § 3078; Code 1873, § 3133; Code 1882, § 3133; Civil Code 1895, § 3992; Civil Code 1910, § 4589; Code 1933, § 37-304.)

JUDICIAL DECISIONS

Cited in *Williams & Bessinger v. Foy Mfg. Co.*, 111 Ga. 856, 36 S.E. 927 (1900).

RESEARCH REFERENCES

C.J.S. — 30 C.J.S., Equity, § 60.

ALR. — Right to contribution from

remainderman, of life tenant who pays off encumbrance on property, 87 ALR 220.

23-2-74. Burden of distinguishing mingled property.

If a party who has charge of the property of others shall so confound it with his own that the line of distinction cannot be drawn, all the inconvenience shall be thrown upon him who causes the confusion; and he shall distinguish his own property or lose it. (Orig. Code 1863, § 3064; Code 1868, § 3076; Code 1873, § 3131; Code 1882, § 3131; Civil Code 1895, § 3990; Civil Code 1910, § 4587; Code 1933, § 37-302.)

JUDICIAL DECISIONS

A guardian must keep separate account for his different wards to enable him to recover any advances made to any of them. *Hudson v. Hawkins*, 79 Ga. 274, 4 S.E. 682 (1887); *English v. English*, 149 Ga. 404, 100 S.E. 362 (1919).

Restitution restricted to traceable, unlawfully mingled fund. — Where a bank, with notice that a fund is the sinking fund of a municipality, illegally receives such fund from the municipality in violation of § 36-38-1, and mingles the fund with the general cash assets of the bank, and shortly thereafter suspends operation and its business is taken in charge by the superintendent of banks (now commissioner of banking and finance) as an insolvent institution, the municipality may trace the trust fund and have restitution from the mingled fund, and any particular property in which the mingled fund may have been invested; but not in other funds of the bank. *Town of Douglasville v. Mobley*, 169 Ga. 53, 149 S.E. 575 (1929).

Procedure to reach trustee's interest of mingled fund. — Where a trustee has so mingled the trust funds with his own estate that they cannot be distinguished, a cestui que trust may bring a complaint to reach the trustee's interest. *Lathrop & Co. v. McBurney & Hollingsworth*, 71 Ga. 815 (1883); *Evans v. Pennington*, 50 Ga. App. 146, 177 S.E. 357 (1934).

Effect of failure to distinguish confused funds. — Where an administrator sold as a unit and for a lump sum four parcels of land as to only two of which he has obtained an order from the court of ordinary (now probate court), the administrator in thus causing a confusion of funds brings upon himself and his security the burden of showing what proportion of the funds were derived from the sale of the other two parcels, in order to escape liability therefor; and, upon a failure to carry such burden they were held liable for the entire sum. *American Sur. Co. v. Pettie*, 178 Ga. 26, 171 S.E. 916 (1933).

And separation and distinguishment required when property sold and applied to creditor's indebtedness. — A factor with whom property has been deposited who, after having made advancements to the

owner upon the property, sells a portion of the property during the owner's lifetime and applies the proceeds thereof upon the indebtedness, and sells the remainder of the property after the death of the owner, is entitled to the proceeds of the property sold before the death of the owner but, by reason of a claim of the widow and minor children of the owner to a year's support, is not entitled to the proceeds of the property sold after the death of the owner, and before he can assert his claim to the proceeds of the property to which he is entitled, he must separate and distinguish them from the proceeds of the property sold after the death of the owner. *Philpot v. Ramsey & Hogan*, 47 Ga. App. 635, 171 S.E. 204 (1933).

Allegations sufficient to support cause of action for accounting. — Petition alleging that the defendant, as agent, had exclusive control of the assets and handling of all of the affairs of two estates, that he used petitioner's individual money in the estate affairs and for his own use, that he wrongfully appropriated to his own use the estate funds and funds of petitioner, that he sold property, and never turned over the proceeds thereof, that he wrote checks on petitioner's personal account and used the proceeds for himself, that he kept all books and records pertaining to such transactions, and denied petitioner access to them, was sufficient to state a cause of action for accounting as against a general demurrer (now motion to dismiss). *Harrison v. Harrison*, 214 Ga. 393, 105 S.E.2d 214 (1958).

Proof that expenses for repairs are authorized is necessary where a vendor retakes and resells property as agent of the purchaser, when he sues for the deficiency in proceeds. *Hargett v. Muscogee Bank*, 32 Ga. App. 701, 124 S.E. 541 (1924).

Cited in Liberty County Land & Lumber Co. v. Barnes, 77 Ga. 748, 1 S.E. 378 (1887); *Clafin & Co. v. Continental Jersey Works*, 85 Ga. 27, 11 S.E. 721 (1890); *Finance Co. v. Lowery*, 36 Ga. App. 337, 136 S.E. 475 (1927); *Johnson v. King Lumber Co.*, 39 Ga. App. 280, 147 S.E. 142 (1929); *Davis v. Wright*, 194 Ga. 1, 21 S.E.2d 88 (1942); *Southland Timber Corp.*

v. State Bank & Trust Co., 220 Ga. 307, 138 S.E.2d 585 (1964).

RESEARCH REFERENCES

ALR. — Law regarding confusion of goods as applied to live stock, 10 ALR 765.

Right to protection against simulation of physical appearance or arrangement of place of business or vehicle, 28 ALR 114.

Necessity and sufficiency of identifica-

tion of goods sold as condition of avoidance of debtor's exemption against claim for purchase price, 150 ALR 1329.

Confusion of goods by accident, mistake, or act of a third person, 39 ALR2d 555.

23-2-75. Offer to pay balance unnecessary.

A petition for an accounting need not offer to pay a balance if found against the complainant. (Orig. Code 1863, § 3069; Code 1868, § 3081; Code 1873, § 3136; Code 1882, § 3136; Civil Code 1895, § 3995; Civil Code 1910, § 4592; Code 1933, § 37-307.)

JUDICIAL DECISIONS

The rule of this section applies to a petition filed for a general account and settlement of a copartnership. Wells v. Strange, 5 Ga. 22 (1848).

Or the rule of this section applies to a petition filed for settlement of an account by a legatee, or distributee. Echols v.

Almon, 77 Ga. 330, 1 S.E. 269 (1886).

Cited in MacKenzie v. Flannery & Co., 90 Ga. 590, 16 S.E. 710 (1892); Marietta Realty & Dev. Co. v. Reynolds, 189 Ga. 147, 5 S.E.2d 347 (1939); Bibb County v. Winslett, 191 Ga. 860, 14 S.E.2d 108 (1941).

23-2-76. Equitable setoff.

Regarding a setoff, equity generally follows the law; but, if there is an intervening equity not reached by the law or if the setoff is of an equitable nature, equity shall take jurisdiction to enforce the setoff. (Orig. Code 1863, § 3072; Code 1868, § 3084; Code 1873, § 3141; Code 1882, § 3141; Civil Code 1895, § 3996; Civil Code 1910, § 4593; Code 1933, § 37-308.)

Cross references. — As to setoff and recoupment generally, see Ch. 7, T. 13.

JUDICIAL DECISIONS

The right of setoff did not originally exist at common law, and before Ch. 7, T. 13 it was cognizable only in a court proceeding in equity. *Robinson v. Lindsey*, 184 Ga. 684, 192 S.E. 910 (1937).

The right to set off one legal demand against another, other than in cases covered by Ch. 7, T. 13, is an equitable right, which is not and has never been recognized by a court of law in this state, except in obedience to a statute, and therefore it can be asserted only in a court having jurisdiction in equity matters. *Quitman Cooperage Co. v. People's First Nat'l Bank*, 178 Ga. 90, 172 S.E. 17 (1933); *Gormley ex rel. Citizens Bank v. Chance*, 55 Ga. App. 838, 191 S.E. 701 (1937); *Autry v. Palmour*, 124 Ga. App. 407, 184 S.E.2d 15 (1971).

The right of a court in this state to exercise equitable jurisdiction to enforce a setoff extends to cases where there is an intervening equity not reached by the law, or where the setoff is of an equitable nature. *Quitman Cooperage Co. v. People's First Nat'l Bank*, 178 Ga. 90, 182 S.E. 17 (1933).

Nonresidence of the plaintiff is an intervening equity. *Gordy Tire Co. v. Dayton Rubber Co.*, 216 Ga. 83, 114 S.E.2d 529 (1960).

And insolvency is one of the intervening equities contemplated by this section. *McLendon v. Galloway*, 216 Ga. 261, 116 S.E.2d 208 (1960); *Autry v. Palmour*, 124 Ga. App. 407, 184 S.E.2d 15 (1971).

However, there are decisions that recognize that plaintiff's nonresidence alone will warrant the exercise of equitable jurisdiction. *Aetna Ins. Co. v. Lunsford*, 179 Ga. 716, 177 S.E. 727 (1934).

The pursuit of the remedy allowed by § 53-12-150 does not make an "equity case" of which the Supreme Court has exclusive jurisdiction. *Robinson v. Lindsey*, 184 Ga. 684, 192 S.E. 910 (1937).

When superior court's equitable powers exercisable. — Where affirmative defense to action is beyond jurisdiction of city or county court in which it was filed, and plaintiff in that court is nonresident or

insolvent so that failure to adjudicate counterclaim urged by original defendant along with main case could result in unfair advantage, superior court may exercise its equitable powers by enjoining suit originally filed and taking cognizance of entire controversy in a single action. *Lester v. Goodyear Tire & Rubber Co.*, 156 Ga. App. 171, 274 S.E.2d 143 (1980).

Where, neither nonresidence nor insolvency of original plaintiff is urged, and there is no showing either that such plaintiff corporation is nonresident or, if so, that it has no agent for service within state, no case has been made out for exercise of equity jurisdiction. *Arnold v. Carter*, 125 Ga. 319, 54 S.E. 177 (1906); *Lester v. Goodyear Tire & Rubber Co.*, 156 Ga. App. 171, 274 S.E.2d 143 (1980).

However, insolvency and nonresidence are not the sole grounds of equitable setoff; they are illustrative, but not all-comprehensive, of such grounds and an equitable setoff will be allowed, although the amount is small, and although the party may have a remedy at law, if to recover that small amount he is driven to many suits and to much trouble and expense. *Quitman Cooperage Co. v. People's First Nat'l Bank*, 178 Ga. 90, 172 S.E. 17 (1933).

The character of the demand does not determine the jurisdiction of the court to entertain the plea of setoff. *Quitman Cooperage Co. v. People's First Nat'l Bank*, 178 Ga. 90, 172 S.E. 17 (1933).

Equity may allow a setoff to prevent a multiplicity of suits. *Burns v. Hill*, 19 Ga. 22 (1855).

Damages arising ex delicto cannot be set off against a cause of action ex contractu, except upon equitable grounds. Such decisions, however, are based upon general equitable principles, and not upon statute. *Harden v. Lang*, 110 Ga. 392, 36 S.E. 100 (1900); *Aetna Ins. Co. v. Lunsford*, 179 Ga. 716, 177 S.E. 727 (1934); *McLendon v. Galloway*, 216 Ga. 261, 116 S.E.2d 208 (1960).

Where petitioner, a nonresident railroad, brought an action ex contractu against a resident of this state for the collection of freight charges owing the petitioner, and by counterclaim the defendant

set off an action ex delicto for negligence, a court of equity will take jurisdiction thereof, under this section, and the Supreme Court has jurisdiction of the writ of error (see §§ 5-6-49, 5-6-50) from the lower court. *Atlanta Paper Co. v. New York, N.H. & H.R.R.*, 211 Ga. 185, 84 S.E.2d 359 (1954).

Except, under Ch. 11, T. 9, an ex delicto counterclaim may be asserted against an ex contractu action. *Ben L. O'Callaghan Co. v. Bond Supply Co.*, 138 Ga. App. 186, 225 S.E.2d 774 (1976).

Setoff not allowed. — To an action ex contractu damages sounding in tort cannot be pleaded in defense, where neither the insolvency nor nonresidence of the plaintiff is set up. *Berry v. Brunson*, 166 Ga. 523, 143 S.E. 761 (1928).

A city court has no jurisdiction whatever to entertain a plea setting up an equitable setoff, or an equitable right of setoff, for the simple reason that to entertain such a plea it is necessary for the court, not only to recognize an equitable right, but to give affirmative relief as a result of such recognition. *Jones v. George S. Riley, Jr. Co.*, 14 Ga. App. 84, 80 S.E. 341 (1913); *Gormley ex rel. Citizens Bank v. Chance*, 55 Ga. App. 838, 191 S.E. 701 (1937).

Setoff was permitted on debt of deceased husband against a note held by his wife. *Harwood v. Andrews*, 71 Ga. 784 (1883).

By § 13-7-11, debts not due may be setoff when the plaintiff resides outside the state, or is insolvent. *Hecht v. Snook & Austin Furn. Co.*, 114 Ga. 921, 41 S.E. 74 (1902); *Metcalf v. People's Grocery Co.*, 24 Ga. App. 663, 101 S.E. 768 (1920).

Accommodation maker of note to corporation could set off liability of its organizers before capital subscribed. *Crandall v. Shepard*, 166 Ga. 396, 143 S.E. 587 (1928).

Setoff was not permitted on a debt of a partner against a debt due the firm. *Metcalf v. People's Grocery Co.*, 24 Ga. App. 663, 101 S.E. 768 (1920).

Where an employee had been wrongfully and unlawfully discharged, the employer must pay all of his pay and

allowances up until, and including day of discharge minus compensation of other concurrent work. *Russell v. Hughes*, 244 Ga. 634, 261 S.E.2d 584 (1979).

The discharged servant is bound to use due diligence to prevent the loss from being more than necessary, and to that end must seek employment in similar business and derive such income from it as he reasonably can, which is to be deducted in fixing the damage to be recovered; the burden, however, of showing that he did obtain employment, or could have obtained it by due diligence, is on the other party. *Russell v. Hughes*, 244 Ga. 634, 261 S.E.2d 584 (1979).

So, employer's liability for wages of wrongfully discharged employee mitigated by subsequent earnings. — Where in an unlawful discharge case, plaintiff was engaged in the real estate appraisal business on a part time basis prior to his discharge and after his discharge devoted his full time to these efforts, any increase in earnings should be in mitigation of the county's liability to plaintiff. *Russell v. Hughes*, 244 Ga. 634, 261 S.E.2d 584 (1979).

Cited in *Mills v. Lumpkin*, 1 Ga. 511, 44 Am. Dec. 677 (1846); *Jordan v. Jordan*, 12 Ga. 77 (1852); *Barnes v. Shinholster*, 14 Ga. 131 (1853); *Lee v. Lee*, 31 Ga. 26, 76 Am. Dec. 296 (1861); *Moody v. Ellervie*, 36 Ga. 666 (1867); *Mordecai v. Stewart*, 37 Ga. 364 (1867); *Hecht v. Snook & Austin Furn. Co.*, 114 Ga. 921, 41 S.E. 74 (1901); *Harris v. Gano*, 117 Ga. 934, 44 S.E. 11 (1903); *Geer v. Cowart*, 5 Ga. App. 251, 62 S.E. 1054 (1908); *Scaffold v. Evans*, 146 Ga. 180, 91 S.E. 21 (1916); *Bellah v. Cleghorn*, 165 Ga. 494, 141 S.E. 311 (1928); *Quitman Cooperage Co. v. People's First Nat'l Bank*, 178 Ga. 90, 172 S.E. 17 (1933); *Shepard v. Veal*, 178 Ga. 535, 173 S.E. 644 (1934); *Attaway v. Attaway*, 193 Ga. 51, 17 S.E.2d 72 (1941); *Jacksonville Paper Co. v. Owen*, 193 Ga. 23, 17 S.E.2d 76 (1941); *Nixon v. Nixon*, 194 Ga. 301, 21 S.E.2d 702 (1942); *Mathis v. Lathrop's Hatchery, Inc.*, 211 Ga. 320, 85 S.E.2d 764 (1955); *Bugden v. Bugden*, 226 Ga. 362, 174 S.E.2d 922 (1970); *Pickett v. Chamblee Constr. Co.*, 124 Ga. App. 769, 186 S.E.2d 123 (1971).

RESEARCH REFERENCES

Am. Jur. 2d. — 20 Am. Jur. 2d, Counterclaim, Recoupment, and Setoff, § 24.

C.J.S. — 80 C.J.S., Set-Off and Counterclaim, § 41 et seq.

ALR. — Right to setoff deposit in insolvent bank against indebtedness to bank, 25 ALR 938; 82 ALR 665; 97 ALR 588.

Immaturity of claim against insolvent at time of insolvency proceedings as affecting right of setoff, 51 ALR 1477.

Equitable set-off of claim of one person and claim of his debtor against another, 93 ALR 1164.

Right of endorser of commercial paper to set off amount which he is obliged to pay thereon against independent indebtedness to insolvent maker or other person antecedently liable, where debt is assigned after making but prior to maturity of paper, 117 ALR 900.

Cotenant's right to contribution in respect of taxes, improvements, or repairs as subject to reduction on account of rents and profits for which he is not otherwise responsible, 136 ALR 1022.

Fractional interest in debt as subject of

setoff, 139 ALR 1328.

Equitable relief where one against whom judgment has been recovered in an action in a court of limited jurisdiction has a claim against the judgment creditor which would have been available as a setoff in such action apart from fact that it was in excess of the court's jurisdiction, 147 ALR 513.

Remedy available against invalid judgment in favor of United States, state, or other governmental unit immune to suit, 163 ALR 244.

Right of attorney to set off claim for unrelated services against client's claim for money collected, 173 ALR 429.

Claim barred by limitation as subject of setoff, counterclaim, recoupment, cross bill, or cross action, 1 ALR2d 630.

Right of trespasser to credit for expenditures in producing, as against his liability for value of, oil or minerals, 21 ALR2d 380.

Husband's right to set off wife's debt against alimony or child support payments, 100 ALR2d 925.

Modern status of law regarding solicitation of business by or for attorney, 5 ALR4th 866.

ARTICLE 5

ADMINISTRATION OF ASSETS GENERALLY

23-2-90. Legal and equitable assets defined; rules of distribution.

(a) Assets are either legal or equitable. Legal assets are such as may be reached by the ordinary process of law. Equitable assets are such as can be reached only through the intervention of equity.

(b) Legal assets, when properly before the court, shall be distributed according to legal liens and priorities. Equitable assets shall be distributed according to justice and right in the particular case, the general rule being that equality is equity.

(c) Sometimes assets are partly legal and partly equitable. In such cases, while the above rule shall be adhered to as to the legal assets, equity shall so administer the equitable assets as to produce general equality. (Orig. Code 1863, §§ 3073, 3074; Code 1868, §§ 3085, 3086; Code 1873, §§ 3142, 3143; Code 1882, §§ 3142, 3143; Civil Code 1895, §§ 3997, 3998; Civil Code 1910, §§ 4594, 4595; Code 1933, §§ 37-401, 37-402.)

JUDICIAL DECISIONS

A court of equity has concurrent jurisdiction with the ordinary (now probate judge) over the settlement of accounts of administrators and executors; and the court first taking jurisdiction will retain it. *Terry v. Chandler*, 172 Ga. 715, 158 S.E. 572 (1931).

The life estate of a cestui que trust is an equitable asset. *Cruger v. Coleman & Newsome*, 75 Ga. 695 (1885). See *Patterson & Co. v. Lawrence*, 83 Ga. 703, 10 S.E. 355 (1889).

A mortgagee of a railroad has a superior claim to the assets than a creditor who owns all of the stock. *Exchange Bank v. Macon Constr. Co.*, 97 Ga. 1, 25 S.E. 326, 33 L.R.A. 800 (1895).

When appointment of receiver by judgment creditor sanctioned. — Where a debt secured by a deed to secure debt, is interest bearing and not due, and a redemption under § 9-13-60 will cause the judgment

creditor to lose a substantial sum approximating the amount of the unearned interest, the debtor having no other property from which to satisfy the judgment, a subsequent judgment creditor may proceed in equity for the appointment of a receiver for the purpose of selling the property subject to the principal of the debt and accrued interest. *Cook v. Securities Inv. Co.*, 184 Ga. 544, 192 S.E. 179 (1937).

Cited in *Robinson v. Bank of Darien*, 18 Ga. 65 (1855); *Stinson v. Williams*, 35 Ga. 170 (1866); *Gamble v. Central R.R. & Banking Co.*, 80 Ga. 595, 7 S.E. 315, 12 Am. St. R. 276 (1888); *Nash v. Cowart*, 162 Ga. 236, 133 S.E. 263 (1926); *Bryant v. Bush*, 165 Ga. 252, 140 S.E. 366 (1927); *Bryan v. Bryan*, 170 Ga. 472, 153 S.E. 188 (1930); *Rose v. Crane Heating Co.*, 198 Ga. 295, 31 S.E.2d 717 (1944); *Routon v. Woodbury Banking Co.*, 209 Ga. 706, 75 S.E.2d 561 (1953).

RESEARCH REFERENCES

ALR. — By whom writ of assistance issued, 21 ALR 358.

Right of creditor to interest after bankruptcy, declared insolvency, or appointment of receiver, where assets are more

than sufficient to pay the principal of all claims, 39 ALR 457; 44 ALR 1170.

Sale in inverse order of alienation, 131 ALR 4.

23-2-91. When equity will interfere with administration of estates.

Equity will not interfere with the regular administration of estates, except upon:

(1) Application of the representative:

(A) For construction and direction; or

(B) For marshaling the assets; or

(2) Application of any person interested in the estate where there is danger of loss or other injury to his interests. (Orig. Code 1863, § 3075; Code 1868, § 3087; Code 1873, § 3144; Code 1882, § 3144; Civil Code 1895, § 3999; Civil Code 1910, § 4596; Code 1933, § 37-403.)

Law reviews. — For article, "Fiduciary Problems of the Executor and Trustee: Conflicts of Interest, Violations of Fidu-

ciary Duties; Surcharge, and Other Remedies of Beneficiaries," see 9 Ga. St. B.J. 187 (1972).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION APPLICATION OF REPRESENTATIVE DANGER OF LOSS OR OTHER INJURY

General Consideration

This section refers to an action to regulate administrations. It has no reference to withdrawing the administration altogether from the court of ordinary (now probate court) in order that a superior court may administer the estate, except where the administration in the court of ordinary (now probate court) originated in fraud or is being fraudulently exercised. *Jones v. Head*, 185 Ga. 857, 196 S.E. 725 (1938).

This section states the general rule that equity will not interfere with the administration of assets, since under § 53-6-26, the court of ordinary (now probate court) has jurisdiction. *Morrisson v. McFarland*, 147 Ga. 465, 94 S.E. 569 (1917); *McKinney v. Powell*, 149 Ga. 422, 100 S.E. 375 (1919).

This section must be construed with § 53-7-160, which declares that a superior court shall have concurrent jurisdiction with the ordinary (now probate judge) over the settlement of accounts of administrators. *Manry v. Manry*, 196 Ga. 365, 26 S.E.2d 706 (1943).

When remedies at law inadequate equity jurisdiction exercisable. — While under § 53-7-160 the superior court has concurrent jurisdiction with the ordinary (now probate judge) over the settlement of accounts of administrators, and under this section, upon the application of an interested person, will assume jurisdiction to prevent loss, yet *Ga. Const. 1976, Art. VI, Sec. VI, Para. I* vests in the ordinary (now probate judge) jurisdiction of probate, and, hence, equity will exercise jurisdiction in such matters only when the available remedies at law are inadequate. *Hamrick v. Hamrick*, 206 Ga. 564, 58 S.E.2d 145

(1950); *Turner v. Turner*, 210 Ga. 586, 82 S.E.2d 137 (1954); *Gaines v. Johnson*, 216 Ga. 668, 119 S.E.2d 28 (1961); *L.L. Minor Co. v. Perkins*, 246 Ga. 6, 268 S.E.2d 637 (1980).

Neither § 53-7-160 nor this section intended to confer upon a superior court the performance of a supervisory office and the duty of overseeing the conduct of the court of ordinary (now probate court) in the administration of estates. *Arnold v. Harris*, 179 Ga. 896, 177 S.E. 738 (1934).

The superior courts have jurisdiction over construction of wills. *National Audubon Soc'y, Inc. v. Marshall*, 424 F.2d 717 (5th Cir. 1970).

Proceeding against administrator, etc., for settlement of estate not interference with regular administration of estate. — A proceeding brought against an administrator or executor for a settlement by an heir at law or legatee is not such interference with the regular administration of estates as is denounced by this section. The jurisdiction of a court of ordinary (now probate court) and a superior court in respect to bringing proceedings for an account and settlement is co-ordinate and equal, and has always been so in this state. The jurisdiction conferred upon the court of ordinary (now probate court) in the management and distribution of estates does not oust the jurisdiction of equity in matters of settlement. *Terry v. Chandler*, 172 Ga. 715, 158 S.E. 572 (1931); *Stroup v. Imes*, 185 Ga. 422, 195 S.E. 411 (1938); *Robinson v. Georgia Sav. Bank & Trust Co.*, 185 Ga. 688, 196 S.E. 395 (1938); *Manry v. Manry*, 196 Ga. 365, 26 S.E.2d 706 (1943).

And a court first taking jurisdiction will "retain it," unless a good reason shall be given for the interference of equity." *Robinson v. Georgia Sav. Bank & Trust Co.*, 185 Ga. 688, 196 S.E. 395 (1938); *Manry v. Manry*, 196 Ga. 365, 26 S.E.2d 706 (1943).

Evidence necessary for court to replace administrator or executor with receiver. — A superior court will not interfere with the regular course of an administrator, by appointing a receiver to take the assets of the estate out of the hands of the administrator, unless the danger is imminent and the charges in the complaint are positive and specific. *Griner v. Wilson*, 181 Ga. 432, 182 S.E. 592 (1935); *Furr v. Jordan*, 196 Ga. 862, 27 S.E.2d 861 (1943); *Salter v. Salter*, 209 Ga. 511, 74 S.E.2d 241 (1953); *Rainey v. Woodcock*, 211 Ga. 101, 84 S.E.2d 41 (1954); *Marlowe v. Moss*, 212 Ga. 781, 95 S.E.2d 796 (1956).

When accounting premature equitable jurisdiction not sustainable on showing imminent danger of loss. — While it would now appear that there are decisions holding that ordinarily an equitable petition for an accounting against an administrator may be maintained without the necessity of showing imminent danger of loss, where it does not appear that the court of ordinary (now probate court) has already assumed jurisdiction for the purpose of an accounting, this rule will not be extended to a case which shows plainly that an accounting would be premature. *Hoffman v. Chester*, 204 Ga. 296, 49 S.E.2d 760 (1948).

Full protection of rights of parties in interest compels interference by courts. — Superior courts are loath to interfere in the administration of estates; but having concurrent jurisdiction with the court of ordinary (now probate court) in the settlement of accounts, they will not hesitate to interfere for the full protection of the rights of parties in interest. *Hamrick v. Prewett*, 174 Ga. 895, 164 S.E. 678 (1932); *Jones v. Proctor*, 195 Ga. 607, 24 S.E.2d 779 (1943); *Spence v. Brown*, 198 Ga. 566, 32 S.E.2d 297 (1944).

And to authorize interference the facts must clearly show there is a good reason for so doing. *Gaines v. Gaines*, 171 Ga. 169, 154 S.E. 883 (1930); *Griner v. Wilson*, 181

Ga. 432, 182 S.E. 592 (1935); *Butler v. Floyd*, 184 Ga. 447, 191 S.E. 460 (1937); *Furr v. Jordan*, 196 Ga. 862, 27 S.E.2d 861 (1943); *Spence v. Brown*, 198 Ga. 566, 32 S.E.2d 297 (1944); *Saliba v. Saliba*, 201 Ga. 681, 40 S.E.2d 732 (1946).

And, to authorize interference in estate, the facts must very clearly show there is a good reason for so doing. *Marlowe v. Moss*, 212 Ga. 781, 95 S.E.2d 796 (1956).

Equity jurisdiction not available because adequate legal remedy. — Where devisee brings equitable complaint against coexecutors of an estate, seeking a partition of the property of the estate through a sale by the receiver, and alleging that more than 20 years had elapsed since the executors had qualified, that all the debts of the estate had been paid, and that executors were in possession of all real and personal property belonging to the estate, the allegations are insufficient to authorize the grant of the prayers for equitable complaint between the devisees because plaintiff devisee has a full and adequate remedy under the law in the court of ordinary (now probate court) to require executors to distribute the estate by division or partition. *Salter v. Salter*, 209 Ga. 511, 74 S.E.2d 241 (1953).

Effect of absence of showing that executor not amenable to future order of probate judge. — An injunction will not lie against real estate agents joined as parties defendant for diversion of rent from property devised to the plaintiffs by the testator in the absence of any showing that the executor is not amenable to and cannot be made to respond to any future order of the ordinary (now probate court judge) holding him responsible, since no reason would appear to disturb the orderly procedure of the court having and exercising jurisdiction. *Bowen v. Bowen*, 200 Ga. 572, 37 S.E.2d 797 (1946).

Jurisdiction of superior court based on indirect consent of defendants. — By consenting to the continuation of a temporary restraining order and to a consent order, defendants consented to an injunction against themselves, thereby at least temporarily conceding that the superior court had jurisdiction, i.e., that plaintiffs had no adequate remedy at law. *Vowell v. Carmichael*, 235 Ga. 387, 219 S.E.2d 732 (1975).

Defense of adequate remedy at law waivable unless timely raised. — The defense available in equity that the complainant has an adequate remedy at law must be raised before the decree is entered; otherwise, this defense is waivable. *Vowell v. Carmichael*, 235 Ga. 387, 219 S.E.2d 732 (1975).

Pleading clear prima facie case required. — When a party comes into a superior court to ask its assistance in accordance with this section, he must state a clear prima facie case. *Mills v. Lumpkin*, 1 Ga. 511, 44 Am. Dec. 665 (1846); *Powell v. Quinn*, 49 Ga. 523 (1873); *Hobby v. Ford*, 149 Ga. 176, 99 S.E. 624 (1919).

Complaint not filed in good faith subject to dismissal. — Hence, a complaint by a legatee alleging that the application for administration pending before the ordinary (now probate judge), was not filed in good faith, will be dismissed. *McArthur v. Jordan*, 139 Ga. 304, 77 S.E. 150 (1913).

And a complaint will be dismissed where it merely alleges that the administrator has paid an improper item, when removal of the administrator is pending before the ordinary (now probate judge). *Gibbs v. Gibbs*, 151 Ga. 745, 108 S.E. 214 (1921).

Effect of disqualification of judge. — Where, the superior court judge of a judicial circuit has become disqualified, any other superior court judge of the state may grant the relief in equity provided by this section. *Jennings v. Smith*, 232 F. 921 (S.D. Ga.), rev'd on other grounds, 238 F. 48 (5th Cir. 1916), cert. denied, 243 U.S. 635, 37 S. Ct. 399, 61 L. Ed. 940 (1917).

A property holder has no right to have a will construed. *Hopkins v. Vance*, 153 Ga. 754, 113 S.E. 157 (1922).

However, the property holder's intervening equities will be protected. *DeVane v. DeVane*, 149 Ga. 783, 102 S.E. 145 (1920).

Collateral heirs of an estate may enjoin administration of an estate by the insolvent wife of the decedent where she is a bigamist and her marriage was procured by fraud. *Crawford v. Crawford*, 139 Ga. 535, 77 S.E. 826 (1913).

So too, a remainderman may compel an administrator to convey land devised to the former, which the latter claims is part

of the estate. *Goza v. Steele*, 158 Ga. 97, 122 S.E. 607 (1924).

And a receiver may be appointed, and injunction granted, pending the determination of the legitimacy of a child legatee. *Clay v. Coggins*, 148 Ga. 543, 97 S.E. 623 (1918); *Sawyer v. Herrington*, 156 Ga. 776, 120 S.E. 623 (1923).

Where a receiver absconds, relief will be granted. *Morris v. Moseley*, 160 Ga. 536, 128 S.E. 753 (1925).

Effect of failure to show necessity of receivership. — No matter how strong the apparent equity of the complainant may be, if there is no necessity for a receivership the courts will not change the status until final decree. *Jue v. Joe*, 207 Ga. 119, 60 S.E.2d 442 (1950).

Construction of a will may be invoked by a devisee or legatee as a basis for recovery of the devised or bequeathed property. *Clay v. Clay*, 149 Ga. 725, 101 S.E. 793 (1920); *Jackson v. Callahan*, 152 Ga. 236, 109 S.E. 499 (1921).

Equity will compel the executor to account to the legatee under § 53-2-109. *Clements v. Fletcher*, 154 Ga. 386, 114 S.E. 637 (1922).

A judgment creditor may have a receiver appointed to prevent a misapplication of the assets. *Dougherty v. McDougald*, 10 Ga. 121 (1859).

Right of executor to extra compensation. — Where, under an equitable petition by one legatee, a receiver has been appointed, the executor may make application to be allowed extra compensation. *Adair v. St. Amand*, 136 Ga. 1, 70 S.E. 578 (1911).

When award on arbitration upheld. — Where there is no allegation of insolvency on the part of the administratrix, or that the heirs are not amply protected by an administrator's bond, a superior court exercising equitable jurisdiction will not interfere with an award on arbitration between a creditor and the administrator. *Walton v. Reid*, 148 Ga. 176, 96 S.E. 214 (1918).

Equity will specifically enforce a parol agreement entered into between two persons, by the terms of which one is to perform certain services during the lifetime of the other, and the latter is to convey certain land at or before his death

in consideration of such services. *Whitmire v. Watkins*, 245 Ga. 713, 267 S.E.2d 6 (1980).

Cited in *Dean v. Central Cotton Press Co.*, 64 Ga. 670 (1880); *Brown v. Benson*, 101 Ga. 753, 29 S.E. 215 (1897); *Spooner v. Bank of Donalsonville*, 159 Ga. 295, 125 S.E. 456 (1924); *Spooner v. Bank of Donalsonville*, 159 Ga. 748, 126 S.E. 722 (1925); *Bryan v. Bryan*, 170 Ga. 472, 153 S.E. 188 (1930); *Evans v. Pennington*, 177 Ga. 56, 169 S.E. 349 (1933); *Caswell v. Caswell*, 177 Ga. 153, 169 S.E. 748 (1933); *Reece v. McCrary*, 179 Ga. 812, 177 S.E. 741 (1934); *Jenkins v. Elliott*, 180 Ga. 303, 178 S.E. 702 (1935); *Pattison v. Farkas*, 180 Ga. 798, 180 S.E. 831 (1935); *Kemp v. Trust Co.*, 182 Ga. 884, 187 S.E. 75 (1936); *Benton v. Turk*, 188 Ga. 710, 4 S.E.2d 580 (1939); *Beecher v. Carter*, 189 Ga. 234, 5 S.E.2d 648 (1939); *Smith v. Pitchford*, 189 Ga. 307, 5 S.E.2d 766 (1939); *Wilcox v. Thomas*, 191 Ga. 319, 12 S.E.2d 343 (1940); *Bacon v. Federal Land Bank*, 109 F.2d 285 (5th Cir. 1940); *McCord v. Walton*, 192 Ga. 279, 14 S.E.2d 723 (1941); *White v. Glasgow*, 193 Ga. 609, 19 S.E.2d 305 (1942); *Astin v. Carden*, 194 Ga. 758, 22 S.E.2d 481 (1942); *Kelley v. Cromer*, 201 Ga. 375, 39 S.E.2d 880 (1946); *Toler v. Goodin*, 74 Ga. App. 468, 40 S.E.2d 214 (1946); *Mitchell v. Mitchell*, 201 Ga. 621, 40 S.E.2d 738 (1946); *Armstrong v. Merts*, 202 Ga. 483, 43 S.E.2d 512 (1947); *Hoffman v. Chester*, 204 Ga. 296, 49 S.E.2d 760 (1948); *Stahl v. Russell*, 206 Ga. 699, 58 S.E.2d 135 (1950); *Mandeville v. Mandeville*, 207 Ga. 125, 60 S.E.2d 460 (1950); *Ware v. Martin*, 207 Ga. 512, 63 S.E.2d 335 (1951); *Montgomery v. Pierce*, 212 Ga. 545, 93 S.E.2d 758 (1956); *Wilkinson v. First Nat'l Bank & Trust Co.*, 217 Ga. 540, 123 S.E.2d 722 (1962); *Estes v. First Nat'l Bank*, 223 Ga. 653, 157 S.E.2d 449 (1967); *Williams v. Cowan*, 226 Ga. 319, 174 S.E.2d 789 (1970); *Underwood v. Mackendree*, 242 Ga. 666, 251 S.E.2d 264 (1978).

Application of Representative

General rule is that only the legal representative of an estate may apply to a court of equitable jurisdiction for direction or construction of a will. The only exception to this rule is upon application of

a person interested in the estate where there is danger of loss or other injury to his interest. *Campbell v. Trust Co.*, 197 Ga. 37, 28 S.E.2d 471 (1943).

Under the provisions of this section, only the representative of the estate may seek the direction of a court for the construction of a will. *Taylor v. Taylor*, 205 Ga. 483, 53 S.E.2d 769 (1949).

The court in a proper case might entertain a suit by executors for direction, and still appoint receivers to execute directions given therein; the two powers of the court are given equal recognition in the Code, and are not antagonistic, but are coordinate and consistent. *Benton v. Turk*, 188 Ga. 710, 4 S.E.2d 580 (1939).

An executor is entitled to the direction of the courts of Georgia and to the aid of equity in the settlement of his accounts in the performance of his duties and the fulfillment of his oath if a proper case for same is alleged. *Georgia Money Corp. v. Rissman*, 220 Ga. 476, 139 S.E.2d 486 (1964).

Allegation necessary when seeking construction of a will. — An action seeking recovery of property devised by a will, in which a construction of the will is sought as a basis for such recovery, is not maintainable in equity, where it is not alleged that the executor has assented to the devise or wrongfully refuses to assent. *Taylor v. Taylor*, 205 Ga. 483, 53 S.E.2d 769 (1949).

A legatee or devisee cannot under normal circumstances maintain a complaint for construction of a will, since that is the duty and prerogative of the executor yet, the right of a legatee or devisee, under stated circumstances, to seek and obtain construction is recognized. *Brewton v. McLeod*, 216 Ga. 686, 119 S.E.2d 105 (1961); *Lowell v. Bouchillon*, 246 Ga. 357, 271 S.E.2d 498 (1980).

And a superior court will not obstruct the orderly procedure of an application for year's support before the judge of the probate court, by assuming jurisdiction under the guise of construing the will; especially where the executor, who is the only proper party for a petition for construction, is not the plaintiff in the petition, but is named as a party defendant by legatees under the will. *Bowen v.*

Bowen, 200 Ga. 572, 37 S.E.2d 797 (1946).

Allegations by legatee sufficient to show necessity for construction and direction. — Where legatee sought by her complaint and was entitled to injunctive relief against the executor to prevent a premature distribution of the assets of the estate contrary to the directions of the will, and alleged that the executor had misconstrued the will, legatee's petition showed such interest by the legatee in the estate and such necessity for construction of the will and direction by the court to protect her distributive share and legacy as would authorize her to bring the action. *Barfield v. Aiken*, 209 Ga. 483, 74 S.E.2d 100 (1953).

Determining ownership of bank deposit not same as construction of a will. — Where a suit was brought by an executor against the wife of the deceased, for the purpose of determining the ownership of money on deposit in a bank, the construction of the will was not involved, and the allegations and prayers of the complaint would not meet the provisions of § 23-2-92, for marshaling assets or for any other equitable relief. *Trust Co. v. Fauss*, 195 Ga. 611, 24 S.E.2d 799 (1943).

Equitable interference not available to remainderman when life tenant still in life. — Where the only title which, under the complaint could inure to claimants by virtue of the wills of third persons consisted of an alleged remainder interest after the death of a person still in life, and they would have no cause of action to recover the property before the death of such life tenant, this section governing equitable interference with the administration of estates does not authorize an action. *Smith v. Pitchford*, 189 Ga. 307, 5 S.E.2d 766 (1939).

Danger of Loss or Other Injury

A superior court will not interfere with the regular administration of estates at the instance of an heir except where there is danger of loss or other injury to his interest. *Gill v. Gill*, 211 Ga. 567, 87 S.E.2d 389 (1955).

Upon application of any person interested in the estate, where there is danger of loss or other injury to his interest, a superior court will entertain jurisdiction. *Lefpoff v. Sicro*, 189 Ga. 554, 6 S.E.2d 687

(1939); *Manry v. Manry*, 196 Ga. 365, 26 S.E.2d 706 (1943); *Conner v. Yawn*, 200 Ga. 500, 37 S.E.2d 541 (1946); *Taylor v. Taylor*, 205 Ga. 483, 53 S.E.2d 769 (1949).

But a person may not seek intervention of equity as a means of wrenching administration of the estate from the jurisdiction of the court of ordinary (now probate court). *Jones v. Head*, 185 Ga. 857, 196 S.E. 725 (1938); *Conner v. Yawn*, 200 Ga. 500, 37 S.E.2d 541 (1946).

Fact that an executor is serving without bond is insufficient to show a danger of loss or injury in the absence of interference by a court of equity. *Taylor v. Taylor*, 205 Ga. 483, 53 S.E.2d 769 (1949); *Fuller v. Fuller*, 217 Ga. 691, 124 S.E.2d 741 (1962).

Actions outside scope of equitable jurisdiction of courts. — The superior courts are not ordinarily empowered on equitable complaint to set aside a previous probate of a will by a court of ordinary (now probate court), or to pass upon the validity of a will, or to interfere with due administration already in progress in a court of ordinary, or to do more than determine the legality or proper construction of particular legacies. *Abercrombie v. Hair*, 185 Ga. 728, 196 S.E. 447 (1938).

One clear exception to this section is where fraud has been or is being committed by the executor. In such cases it is deemed that the only complete and adequate remedy to which the heirs, legatees, or devisees may be entitled can only be afforded by a court exercising equitable jurisdiction. *King v. King*, 225 Ga. 142, 166 S.E.2d 347 (1969).

Hence, where a legatee alleges fraud, and seeks cancellation and rescission of a deed executed by the defendant executor conveying property belonging to the estate to the executor's wife, the superior court is authorized to take necessary action for the complete and just administration of the estate in one action. *King v. King*, 225 Ga. 142, 166 S.E.2d 347 (1969).

Proof of fraud needed for superior court to set aside judgment of probate court. — However, "the judgment of a court of competent jurisdiction may be set aside by a decree in equity, for fraud, accident, or mistake." The fraud in the procurement of such a judgment must have been actual and positive, done with knowledge, and not merely constructive fraud,

committed in ignorance of the true facts. Thus a superior court may set aside as void a judgment of the court of ordinary (now probate court) appointing an administrator where "an allegation of fact in a petition of the court of ordinary (now probate court), which was necessary to give the court jurisdiction, was known by the petitioner to be false, and therefore was fraud upon the court." *Abercrombie v. Hair*, 185 Ga. 728, 196 S.E. 447 (1938).

Waste, mismanagement and insolvency of bondless executor sufficient for grant of equitable relief. — Where the plaintiff, a distributee of an estate in the hands of an executor alleged to be insolvent and without bond, alleges facts which show waste and mismanagement, and a situation is presented where he would be remediless unless granted the relief which a superior court alone can grant, he is a party interested in the estate, and alleges facts showing danger of loss, thus bringing himself within the exception mentioned in this section. *Walters v. Suarez*, 188 Ga. 190, 3 S.E.2d 575 (1939).

Limited use of paragraph (2) exception. — Paragraph (2) of this section is not intended, in the absence of any allegation of fraud, to supply a means of reviewing a judgment of the court of ordinary (now probate court) in the administration of an estate of which it has assumed jurisdiction, or of ousting the jurisdiction of the court of ordinary (now probate court). *Darby v. Green*, 174 Ga. 146, 162 S.E. 493 (1932).

If an insolvent executor in charge of real estate which includes houses which need repairs, no matter however small, and he, being without sufficient funds to make them, fails to do so, and on this account the property is deteriorating, the persons to whom the property has been devised are entitled to have the same protected, and the appointment of a receiver with directions to him to have the repairs made, seems not to be an inappropriate remedy. *Jones v. Proctor*, 195 Ga. 607, 24 S.E.2d 779 (1943).

Action alleging denial of information needed by widow for determining to take under will or by election maintainable in equity. — Where wife of the deceased testator alleges that the executor refuses to

give her any information concerning the money or property belonging to the estate, which information she must have in order to determine the question whether or not to accept a bequest contained in the will in lieu of dower and a year's support, widow was a "person interested in the estate" and entitled to maintain action in equity against executor. *Jackson v. Jackson*, 206 Ga. 470, 57 S.E.2d 602 (1950).

And, where minor children of testator participate in the residue of the estate after specific bequests have been satisfied, and all persons provided for in the will with the exception of the children were granted their legacies in the probate court, children qualified under statute as "person interested in estate," and were entitled to appointment of receiver to restrain executor and others from disposing of estate property. *Jackson v. Jackson*, 206 Ga. 470, 57 S.E.2d 602 (1950).

Absent complaint from estate representative proof needed to sustain complaint of persons interested in estate. — This provision requires a determination of whether plaintiffs, as persons interested in the estate because they are parties to a testamentary agreement, made sufficient allegations as to "danger of loss or other injury to their interests" when there is no application from the representative. *Fuller v. Fuller*, 217 Ga. 691, 124 S.E.2d 741 (1962).

Where the interested party's allegations amount to apprehension of injury, this has been held insufficient as a basis for injunction and interference with administration of estates. *Fuller v. Fuller*, 217 Ga. 691, 124 S.E.2d 741 (1962).

Preventing irreparable injury to estate sufficient ground for intervention by superior court. — Where complainant did not seek removal of the defendant as an executor under § 53-7-32, nor that he be required to make bond under § 53-7-148 but sought a restraining order to prevent the defendant from making contracts on behalf of the estate, and paying out funds belonging to the estate, without the concurrence of the complainants, which could not be granted by the ordinary (now probate judge) and which was contrary to the provisions of § 53-7-5, the allegations of

the complaint show the necessity of the intervention of a court of equitable jurisdiction in order to prevent irreparable injury

to the estate. *Saffold v. Cheatham*, 221 Ga. 155, 143 S.E.2d 629 (1965).

RESEARCH REFERENCES

Am. Jur. 2d. — 31 Am. Jur. 2d, Executors and Administrators, §§ 25, 548.

C.J.S. — 30 C.J.S., Equity, § 61.

ALR. — Power of court to authorize compromise of infants' rights in controversies over estates or property, 33 ALR 105.

Applicability of nonclaim statutes to claims arising under contract executory at the time of death, 41 ALR 144; 47 ALR 896.

Rule as to marshaling assets as affected by homestead law, 44 ALR 758; 77 ALR 371.

Power of court to authorize pledge or other disposal of property in manner not authorized by trust deed or trust agreement securing bonds or participation certificates, 105 ALR 195.

Doctrine of marshaling assets where the two funds covered by the paramount lien

are subject respectively to subordinate liens in favor of different persons, 106 ALR 1102.

Jurisdiction of equity to sequester, seize, enjoin transfer of, or otherwise provisionally secure assets for application upon money demand which has not been reduced to judgment, 116 ALR 270.

Equity jurisdiction to determine valuation, where arbitration or appraisal has failed, under long-term lease providing for appraisal of premises and fixing rental value at stated intervals, 26 ALR2d 744.

Applications of rule permitting courts to exercise jurisdiction over equity actions against foreign personal representatives where there are assets within forum, 53 ALR2d 323.

Construction and operation of will or trust provision appointing advisors to trustee or executor, 56 ALR3d 1249.

23-2-92. Application for direction or construction of will.

In cases of difficulty in construing wills, in distributing estates, in ascertaining the persons entitled, or in determining under what law property should be divided, the representative may ask the direction of the court, but not on imaginary difficulties or from excessive caution. (Orig. Code 1863, § 3076; Code 1868, § 3088; Code 1873, § 3145; Code 1882, § 3145; Civil Code 1895, § 4000; Civil Code 1910, § 4597; Code 1933, § 37-404.)

Law reviews. — For note, "Determining Principal and Income Allocation in

Georgia Trusts," see 8 Ga. St. B.J. 564 (1972).

JUDICIAL DECISIONS

This section enables an administrator to bring a bill for instructions. *Newsome v. Cagburn*, 30 Ga. 291 (1860).

The superior courts have jurisdiction over construction of wills. *National Audubon Soc'y, Inc. v. Marshall*, 424 F.2d 717 (5th Cir. 1970).

This section is within one of the excep-

tions stated in § 23-2-91. But where the duty of the executor is clear, equity will not interfere. *Adams v. Dixon*, 19 Ga. 513, 65 Am. Dec. 608 (1856); *Kaiser v. Kaiser*, 178 Ga. 355, 173 S.E. 688 (1934).

However, devises which are contrary to law will be declared void by equity. *Moore v. Cook*, 151 Ga. 523, 107 S.E. 518 (1921).

Neither this section nor § 23-2-93 declares that an injunction must be granted; the propriety of this relief will depend upon the facts of each particular case, and the general principles of equity as related to injunction. *Hudson v. Tate*, 188 Ga. 707, 4 S.E.2d 577 (1939).

In action filed by executors in equity to marshal assets, and for direction, and to enjoin creditors, heirs, and legatees, named as defendants, from instituting any independent action with reference to the matters referred to in the petition, under the pleadings and the evidence the court did not err in refusing to grant an injunction. *Hudson v. Tate*, 188 Ga. 707, 4 S.E.2d 577 (1939).

Heirs at law may not maintain a complaint for the construction of a will. *Wright v. Heffernan*, 205 Ga. 75, 52 S.E.2d 289 (1949).

And, a devisee under the will cannot maintain a complaint for construction of the will. *Rainey v. Woodcock*, 211 Ga. 101, 84 S.E.2d 41 (1954).

Because, only the representative of an estate may ask direction of the court in cases of difficulty in construing wills, or in distributing estates, in ascertaining the persons entitled, or in determining under what law property should be divided, and such direction may not be invoked by a legatee. *Jackson v. Callahan*, 152 Ga. 236, 109 S.E. 499 (1921); *Palmer v. Neely*, 162 Ga. 767, 135 S.E. 90 (1926); *McLarty v. Abercrombie*, 168 Ga. 742, 149 S.E. 30 (1929); *Campbell v. Trust Co.*, 197 Ga. 37, 28 S.E.2d 471 (1943); *Wright v. Heffernan*, 205 Ga. 75, 52 S.E.2d 289 (1949); *Barfield v. Aiken*, 209 Ga. 483, 74 S.E.2d 100 (1953).

An executor may bring a complaint for construction of a will although the executor may be a legatee thereunder. *Watts v. Finley*, 187 Ga. 629, 1 S.E.2d 723 (1939); *Barker v. Wilkinson*, 222 Ga. 329, 149 S.E.2d 698 (1966).

The court might entertain an action by executors for direction, and still appoint receivers to execute directions given therein; the two powers of the court are given equal recognition in the Code, and are not antagonistic, but are coordinate and consistent. *Benton v. Turk*, 188 Ga. 710, 4 S.E.2d 580 (1939).

And a widow can maintain action against her coexecutors in her representative capacity as executrix, but not in her individual capacity as legatee, widow and sole heir at law of testator; she can maintain action as executrix even though, since she has a manifest interest in the subject matter of the action, a decree will also adjudicate her claim as legatee, widow and heir at law. *Armstrong v. Merts*, 202 Ga. 483, 43 S.E.2d 512 (1947).

However, legatee authorized to bring action upon showing of sufficient interest in estate and necessity for court's direction. — Where legatee sought by her complaint and was entitled to injunctive relief against the executor to prevent a premature distribution of the assets of the estate contrary to the directions of the will, and alleged that the executor had misconstrued the will, legatee's complaint showed such interest by the legatee in the estate and such necessity for construction of the will and direction by the court to protect her distributive share and legacy as would authorize her to bring the action. *Barfield v. Aiken*, 209 Ga. 483, 74 S.E.2d 100 (1953).

Hence, a creditor of a beneficiary of a will cannot bring a complaint for construction. *Jackson v. Callahan*, 152 Ga. 236, 109 S.E. 499 (1921). Nor can a legatee. *Maneely v. Steele*, 147 Ga. 399, 94 S.E. 227 (1917); *Morrison v. McFarland*, 147 Ga. 465, 94 S.E. 569 (1917).

Equitable interference not available to remainderman when life tenant still in life. — Where the only title which, under the petition, could inure to claimants by virtue of the wills of third persons consisted of an alleged remainder interest after the death of a person still in life, and they would have no cause of action to recover the property before the death of such life tenant, § 23-2-91 governing equitable interference with the administration of estates does not authorize such an action. *Smith v. Pitchford*, 189 Ga. 307, 5 S.E.2d 766 (1939).

In a complaint by an executor for construction of a will, all persons named as legatees are proper parties. *Watts v. Finley*, 187 Ga. 629, 1 S.E.2d 723 (1939).

However, a person who claims an interest in the estate, not arising under the will, is not a party to a complaint for direction. *Bond v. Connelly*, 8 Ga. 302 (1850).

Where interveners are not claiming under the will but, their claim is antagonistic to the will, and they are claiming under the will of another, then the issue presents none of the questions included within the provisions of this section. *Phillips v. Kelly*, 176 Ga. 111, 167 S.E. 281 (1932).

A superior court will not construe a will when requested by the executor "on imaginary difficulties or from excessive caution." *Venable v. Dallas*, 212 Ga. 595, 94 S.E.2d 416 (1956).

Therefore, complaint seeking a declaratory judgment, which shows that the complainant was not uncertain or insecure as to his asserted rights as executor as against the claim of a legatee, was properly dismissed on demurrer (now motion to dismiss). *Venable v. Dallas*, 212 Ga. 595, 94 S.E.2d 416 (1956).

However, where one item of a will contained a bequest of "twenty thousand (\$20,000.00) dollars," and another item a bequest to the "University Hospital of Augusta, Georgia," there being no such legal entity in the said city, the executors of such will were authorized to bring in a superior court a complaint seeking construction and direction. *Moss v. Youngblood*, 187 Ga. 188, 200 S.E. 689 (1938).

Also, a superior court will not assume jurisdiction of an estate and obstruct the procedure for the administration of an estate under the guise of construing the will. *Bandy v. Smith*, 211 Ga. 192, 84 S.E.2d 449 (1954).

Actions not countenanced from executor. — An executor who seeks the aid of a superior court and invokes a construction of the will with whose execution he has been charged by a testator will not be heard to retract his statement that the will requires construction, and mend his hold by contending, in substance, that the contents of the will are so plain as to require no construction, nor can an executor in such circumstances advocate or promote the interest of any party other than himself, in any litigation involving the construction of

the will. *McAfee v. Board of Firemasters*, 186 Ga. 262, 197 S.E. 802 (1938).

Complexity arising from agreement growing out of widow's application for dower was sufficient to sustain a complaint under this section. *Hill v. Clark*, 48 Ga. 526 (1873).

If a widow is entitled to a year's support, there is no cause, legal or equitable, for delaying enjoyment of this right; and if it cannot be asserted against the executor, he can defend himself at law upon his title as executor, and has no need for an injunction. *Smith v. Pitchford*, 189 Ga. 307, 5 S.E.2d 766 (1939).

Probate court retains jurisdiction of estate when construction of a will becomes incidental to probate proceedings. — Though it is the rule that a direct proceeding to construe a will must be brought in a superior court, where the construction of a will is incidentally involved in a proceeding over which the probate court has jurisdiction, the probate court has jurisdiction under such conditions to interpret the will so far as may be necessary in the proceedings before it. *Kaiser v. Kaiser*, 178 Ga. 355, 173 S.E. 688 (1934).

Removal to a federal court of an action for directions in the distribution of estates, is not permitted. *Shehane v. Smith*, 257 F. 823 (N.D. Ga. 1919).

Cash surrender value of policy not subject to garnishment. — The cash surrender and cash loan value of a policy of life insurance accruing at the end of a specified tontine period is not subject to garnishment by creditors of the insured; nor will such value be made available to the judgment creditor of the insured by a superior court in proceedings instituted for the purpose of obtaining equitable relief analogous to a process of garnishment at law. *Farmers & Merchants Bank v. National Life Ins. Co.*, 161 Ga. 793, 131 S.E. 902, 44 L.R.A. 1184 (1926).

Determining ownership of bank deposit not same as construction of a will. — Where a suit was brought by an executor against the wife of the deceased, for the purpose of determining the ownership of money on deposit in a bank, the construction of the will was not involved, and the allegations and prayers of the petition would not meet the provisions of

§ 23-2-93, for marshaling assets or for any other equitable relief. *Trust Co. v. Fauss*, 195 Ga. 611, 24 S.E.2d 799 (1943).

Cited in *Clark v. Clark*, 17 Ga. 485 (1855); *Sanford v. Thompson*, 18 Ga. 554 (1855); *Miles & Co. v. Peabody*, 64 Ga. 729 (1880); *Mechanics' & Traders Bank v. Harrison*, 68 Ga. 463 (1882); *Echols v. Almon*, 77 Ga. 330, 1 S.E. 269 (1886); *Gaines v. Gaines*, 116 Ga. 476, 42 S.E. 763 (1902); *Durham v. Harris*, 134 Ga. 134, 67 S.E. 668 (1910); *Moore v. Cook*, 151 Ga. 523, 107 S.E. 518 (1921); *Cooper v. Reeves*, 161 Ga. 232, 131 S.E. 63 (1925); *Hamrick v. Prewett*, 174 Ga. 895, 164 S.E. 678 (1932); *Reynolds v. Ingraham*, 179 Ga. 398, 175 S.E. 918 (1934); *Reece v. McCrary*, 179 Ga. 812, 177 S.E. 741 (1934); *Pattison v. Farkas*, 180 Ga. 798, 180 S.E. 831 (1935); *Kemp v. Trust Co.*, 182 Ga.

884, 187 S.E. 75 (1936); *Bearden v. Longino*, 183 Ga. 819, 190 S.E. 12 (1937); *Morris v. Morris*, 185 Ga. 533, 195 S.E. 734 (1937); *Brown v. Anderson*, 186 Ga. 220, 197 S.E. 761 (1938); *Lassiter v. Bank of Dawson*, 191 Ga. 208, 11 S.E.2d 910 (1940); *Pharis v. Perry*, 193 Ga. 125, 17 S.E.2d 545 (1941); *Maxwell v. Hollis*, 216 Ga. 224, 115 S.E.2d 360 (1960); *Georgia Money Corp. v. Rissman*, 220 Ga. 476, 139 S.E.2d 486 (1964); *Williams v. Cowan*, 226 Ga. 319, 174 S.E.2d 789 (1970); *McNeely v. McNeely*, 228 Ga. 418, 186 S.E.2d 105 (1971); *Charles v. Citizens & S. Nat'l Bank*, 232 Ga. 208, 206 S.E.2d 8 (1974); *Trust Co. v. Woodruff*, 236 Ga. 220, 223 S.E.2d 91 (1976); *Underwood v. MacKendree*, 242 Ga. 666, 251 S.E.2d 264 (1978); *DuBose v. Box*, 246 Ga. 660, 273 S.E.2d 101 (1980).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 *Am. Jur. 2d*, Equity, § 55.

C.J.S. — 30 *C.J.S.*, Equity, § 61.

ALR. — Right of trustee, executor, or administrator to maintain interpleader, 152 *ALR* 1122.

Applications of rule permitting courts to

exercise jurisdiction over equity actions against foreign personal representatives where there are assets within forum, 53 *ALR2d* 323.

Construction and operation of will or trust provision appointing advisors to trustee or executor, 56 *ALR2d* 1249.

23-2-93. Marshaling assets of decedent's estate.

In all cases where legal difficulties arise as to the distribution of assets in payment of debts or where from any circumstances the ordinary process of law would interfere with the due administration of an estate, without fault on the part of the representative of the estate, a petition to marshal the assets shall be maintained at the instance of the representative. (Orig. Code 1863, § 3077; Code 1868, § 3089; Code 1873, § 3146; Code 1882, § 3146; Civil Code 1895, § 4001; Civil Code 1910, § 4598; Code 1933, § 37-405.)

JUDICIAL DECISIONS

This section grants the right to an administrator to marshal the assets in equity where an estate is insolvent, and he is harassed by actions at law by creditors. *Johnson v. Flanders*, 65 Ga. 691 (1880).

The existence of a constructive trust is not always necessary to confer jurisdiction. *Walker v. Morris*, 14 Ga. 323 (1853).

Under § 9-8-3, equity may appoint a receiver to marshal assets, where a cred-

itors' petition is filed. *Harrell v. Bank of Leesburg*, 159 Ga. 854, 127 S.E. 228 (1925).

However, creditors with superior claims, which are not disputed cannot be joined in the petition. *Green v. Allen*, 45 Ga. 205 (1872); *Turk v. Ross*, 59 Ga. 378 (1877); *Herrington v. Tolbert*, 110 Ga. 528, 35 S.E. 687 (1900).

The petition may be filed where the estate is solvent. *Daniel v. Columbus Fertilizer Co.*, 96 Ga. 775, 22 S.E. 904 (1895).

Actions at law are enjoined where a creditors' petition is filed by a temporary administrator. *Beers & Bogart v. Strohecker*, 21 Ga. 442 (1857); *Johnson v. Brady*, 24 Ga. 131 (1858).

A corporation cannot maintain creditor's petition to marshal its assets. *Bank of Soperton v. Empire Realty Trust Co.*, 142 Ga. 34, 82 S.E. 464 (1914).

However, the jurisdiction of the court cannot be attacked collaterally. *Bartlett v. Taylor*, 148 Ga. 854, 98 S.E. 491 (1919).

Ascertainment of the fund which can be distributed is the primary step, after a petition is filed. *Jordan v. Brown*, 72 Ga. 495 (1884).

A willful disobedience of the provisions of a will, will bar a petition under this section. *Campbell v. Campbell*, 37 Ga. 465 (1867). See *Beers & Bogart v. Strohecker*, 21 Ga. 442 (1857).

A plea of the statute of limitation against some debts, and not others, is improper. *Jordan v. Brown*, 72 Ga. 495 (1884).

Where executor carried on the business of the decedent for a year, a petition may be maintained to determine order of payment of debts. *Stephens v. James*, 77 Ga. 139, 3 S.E. 160 (1886).

Neither this section nor § 23-2-92 declares that an injunction must be granted; the propriety of this relief will

depend upon the facts of each particular case, and the general principles of equity as related to injunction. *Hudson v. Tate*, 188 Ga. 707, 4 S.E.2d 577 (1939).

In action filed by executors in equity to marshal assets, and for direction, and to enjoin creditors, heirs, and legatees, named as defendants, from instituting any independent action with reference to the matters referred to in the petition, under the pleadings and the evidence the court did not err in refusing to grant an injunction. *Hudson v. Tate*, 188 Ga. 707, 4 S.E.2d 577 (1939).

Determining ownership of bank deposit not same as construction of a will. — Where an action was brought by an executor against the wife of the deceased, for the purpose of determining the ownership of money on deposit in a bank, the construction of the will was not involved, and the allegations and prayers of the petition would not meet the provisions of this section, for marshaling assets or for any other equitable relief. *Trust Co. v. Fauss*, 195 Ga. 611, 24 S.E.2d 799 (1943).

A junior creditor is not entitled to marshaling assets against a senior creditor, unless it is shown that its application will actually benefit the junior creditor, and also will not impair or hazard the securities of the senior creditor, or unreasonably delay their enforcement. *Moncrief Furnace Co. v. Northwest Atlanta Bank*, 193 Ga. 440, 19 S.E.2d 155 (1942).

Cited in *George P. Thomas & Co. v. Stokes*, 44 Ga. 631 (1872); *Hamrick v. Prewett*, 174 Ga. 895, 164 S.E. 678 (1932); *Federal Land Bank v. Farmers' & Merchants' Bank*, 177 Ga. 505, 170 S.E. 504 (1933); *Kemp v. Trust Co.*, 182 Ga. 884, 187 S.E. 75 (1936); *Maxwell v. Hollis*, 216 Ga. 224, 115 S.E.2d 360 (1960); *Estes v. First Nat'l Bank*, 223 Ga. 653, 157 S.E.2d 449 (1967).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Equity, § 55.

ALR. — Rule as to marshaling assets where liens are concurrent as to one fund, 36 ALR 663.

Rule as to marshaling assets as affected by homestead law, 44 ALR 758; 77 ALR 371.

Doctrine of marshaling assets or sale in inverse order of alienation as applicable to tax sale, 88 ALR 1216; 131 ALR 4th 79.

Right of maker of negotiable paper which is subject to defenses as against payee-pledgeor, but not as against pledgee (by invoking doctrine of marshaling assets or otherwise) to require the latter to resort first to other collateral, 92 ALR 1085.

Doctrine of marshaling assets where the two funds covered by the paramount lien are subject respectively to subordinate liens in favor of different persons, 106 ALR 1102.

Doctrine of inverse order of alienation as affected by release of part of property covered by mortgage or other lien, 110 ALR 65; 131 ALR4th 108.

Jurisdiction of equity to sequester, seize,

enjoin transfer of, or otherwise provisionally secure assets for application upon money demand which has not been reduced to judgment, 116 ALR 270.

Sale in inverse order of alienation, 131 ALR 4.

May doctrine of marshaling assets be invoked to require senior lienor to resort first to the surety, or property of the surety, of common debtor, 135 ALR 738.

Applications of rule permitting courts to exercise jurisdiction over equity actions against foreign personal representatives where there are assets within forum, 53 ALR2d 323.

23-2-94. Compelled election in marshaling assets.

In marshaling assets, the court shall look to the equities of the creditors and, where cases arise for election, shall compel the parties to elect. (Orig. Code 1863, § 3078; Code 1868, § 3090; Code 1873, § 3147; Code 1882, § 3147; Civil Code 1895, § 4002; Civil Code 1910, § 4599; Code 1933, § 37-406.)

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Equity, § 55.

ALR. — Rule as to marshaling assets as affected by homestead law, 44 ALR 758; 77 ALR 371.

Doctrine of marshaling assets where the two funds covered by the paramount lien are subject respectively to subordinate liens

in favor of different persons, 106 ALR 1102.

Doctrine of marshaling assets where the two funds covered by the paramount lien are subject respectively to subordinate liens in favor of different creditors, 76 ALR3d 326.

23-2-95. Creditors' petitions.

Creditors' petitions may be filed at the instance of any creditor, the privilege being extended to all to appear and become parties within a reasonable time. (Orig. Code 1863, § 3079; Code 1868, § 3091; Code 1873, § 3148; Code 1882, § 3148; Civil Code 1895, § 4003; Civil Code 1910, § 4600; Code 1933, § 37-407.)

JUDICIAL DECISIONS

This section does not confine the right to bring a creditor's petition to instances where one has a lien, or has reduced the claim to judgment. *Stephens v. Whitehead*, 75 Ga. 294 (1885); *Steele Lumber Co. v. Laurens Lumber Co.*, 98 Ga. 329, 24 S.E. 755 (1896).

The nature of a creditors' petition is a proceeding in rem, and any person in interest may come in before disposition of the fund. *Minnehan & Hazlehurst v. Brunswick & A.R.R.*, 52 Ga. 248 (1874).

But the burden is upon the creditor to contradict the priorities as arranged in the decree. *Gray v. Perry*, 51 Ga. 180 (1874).

An exemption set apart to a bankrupt may be reached by creditors holding notes containing waivers of exemption. *Peppers v. Cauthen*, 143 Ga. 229, 84 S.E. 477 (1915).

Creditors not deprived of right to petition by bank's assignment. — An assignment by a bank of its effects to which the creditors are not parties or consenting, cannot deprive them of the right to maintain a petition, under this section.

Schley v. Dixon, 24 Ga. 273, 71 Am. Dec. 121 (1858).

Creditors of an insolvent corporation may unite in the same petition to charge the stockholders, who were also directors, for fraudulently abstracting the capital stock of the bank. *Semmes v. Mott*, 27 Ga. 92 (1859).

A decree that the debtor's money be paid into court will follow where a defendant in a creditors' petition admits that he has such funds. *Rutherford v. Jones*, 26 Ga. 150 (1858).

Prior to the decree, the defendant may tender satisfaction and compel the creditor to accept it. *McDougald v. Dougherty*, 11 Ga. 570 (1852).

Cited in *Martin v. Tidwell*, 36 Ga. 332 (1867); *Albany & Rensselaer Iron & Steel Co. v. Southern Agrl. Works*, 76 Ga. 135, 2 Am. St. R. 26 (1886); *Hardy v. Hardy*, 143 Ga. 703, 86 S.E. 780 (1915); *Grimmett v. Barnwell*, 184 Ga. 461, 192 S.E. 191 (1937); *J.B. Withers Cigar Co. v. Kirkpatrick*, 196 Ga. 41, 26 S.E.2d 255 (1943); *Turner v. Tyson*, 211 Ga. 53, 84 S.E.2d 86 (1954).

RESEARCH REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d, Creditors' Bills, § 3 et seq.

C.J.S. — 21 C.J.S., Creditors' Suits, §§ 37, 53.

23-2-96. When equitable assets may be reached by creditor.

Equitable assets may be reached by a creditor in every case where he shows that there is danger of not being satisfied out of legal assets. (Orig. Code 1863, § 3084; Code 1868, § 3096; Code 1873, § 3153; Code 1882, § 3153; Civil Code 1895, § 4004; Civil Code 1910, § 4601; Code 1933, § 37-408.)

Law reviews. — For note, "Georgia Becomes A Quasi Community Property State, see 17 Ga. St. B.J. 134 (1981).

JUDICIAL DECISIONS

Appointment of receiver to sell debtor's property to prevent financial loss by judgment creditor. — Where a debt secured by a deed is interest bearing and not due, and a redemption under § 9-13-60 will cause the judgment creditor to lose a substantial sum approximating the amount of the unearned interest, the debtor having no other property from which to satisfy the judgment, a subsequent judgment creditor may proceed in equity for the appointment of a receiver for the purpose of selling the property subject to the principal of the debt and accrued interest. *Cook v. Securities Inv. Co.*, 184 Ga. 544, 192 S.E. 179 (1937).

Creditors can bring a petition in equity to reach the interest of a beneficiary under a trust unless the beneficiary's interest is exempt by the terms of the trust or by statute. The creditor must exhaust legal remedies before proceeding in equity, but this requirement does not apply if it appears that the attempt to exhaust legal remedies would be futile. *Henderson v. Collins*, 245 Ga. 776, 267 S.E.2d 202 (1980).

Cited in *Grimmett v. Barnwell*, 184 Ga. 461, 192 S.E. 191 (1937); *Yancey v. Grafton*, 197 Ga. 117, 27 S.E.2d 857 (1943).

RESEARCH REFERENCES

ALR. — Jurisdiction of equity to sequester, seize, enjoin transfer of, or otherwise provisionally secure assets for application upon money demand which has not been reduced to judgment, 116 ALR 270.

23-2-97. Time limit for intervention in case disposing of assets; publication of order.

(a) In all equity cases in which assets of either or both parties are being administered, marshaled, or otherwise disposed of by the court, upon motion of either party or of the court at least 60 days before the term for trial, an order shall be passed bearing the title of the case and addressed to all persons concerned, requiring all persons claiming an interest in the assets to intervene in the case by not later than a certain date to be fixed by the court. The date shall be not less than 60 days nor more than 90 days from the date on which the order is filed. After filing, the order shall be published twice each month for two consecutive months in the official organ for legal advertisements in the county in which the case is pending.

(b) After the passage of the last date for intervention fixed in the published order, no person interested in the assets of the case shall be allowed to intervene. (Ga. L. 1939, p. 344, §§ 1, 2.)

Law reviews. — For article discussing the problems with acquiring good title, see 15 Ga. B.J. 281 (1953).

JUDICIAL DECISIONS

Purpose of this section is to fix a certain date when an estate being administered by an officer of the court, can be closed, rights fixed, and distribution of the assets made. If claims are to be recognized, either by way of amended claims or as new claims, after the date fixed in accordance with the provisions of this section, the very purpose of the law would be defeated. *Cohen v. McCandless*, 202 Ga. 231, 42 S.E.2d 739 (1947).

And, it was the intention of the legislature to correct the fact that no purchaser knew whether he would purchase property free of liens, and that no receiver could be sure of selling property free of liens. *Jones v. Staton*, 78 Ga. App. 890, 52 S.E.2d 481 (1949).

All cases, including equity cases, are excluded from this section where there are no assets to administer, marshal, or otherwise dispose of by the court. *Pope v. Pope*, 211 Ga. 74, 84 S.E.2d 43 (1954).

In order for the court to issue an order to bar the filing of interventions in equity cases after the date fixed in such order, it is essential that the court have in its control assets to administer, marshal, or otherwise dispose of. *Maxwell v. Hollis*, 216 Ga. 224, 115 S.E.2d 360 (1960).

Superior courts can issue bar orders only in cases where the courts have in hand assets that are being administered, marshaled, or otherwise disposed of by the court. *Pope v. Pope*, 211 Ga. 74, 84 S.E.2d 43 (1954).

Generally failure to comply with a "bar order" in receivership proceedings after notice precludes sharing in assets, similarly, failure to comply with a "bar order" directing claimants to appear and make known their objections to the receiver's final report and recommendations generally precludes later objections. *Fibertex, Inc. v. Caldwell*, 236 Ga. 136, 223 S.E.2d 111 (1976).

And, case must be pending before superior court. — While this section refers to "all equity cases" now or hereafter pending, it joins thereto the qualifying provision, "wherein assets of either or both parties to the cause are being administered, marshaled, or otherwise disposed of by the

court," thus plainly and conclusively showing that, before this section can be resorted to, the case must be pending in a superior court, and assets must then be in the custody of the court for the purpose of being administered, marshaled, or otherwise disposed of. *Pope v. Pope*, 211 Ga. 74, 84 S.E.2d 43 (1954); *Maxwell v. Hollis*, 216 Ga. 224, 115 S.E.2d 360 (1960).

Section applicable to tax execution. — This section provides for circumstances under which all creditors may by inaction lose their rights, including creditors holding executions. It is therefore applicable to tax executions. *Suttles v. J.B. Withers Cigar Co.*, 194 Ga. 617, 22 S.E.2d 129 (1942).

Effect of bar order on tax collector and taxes. — A bar order passed by the court, and the advertisement pursuant thereto in reference to intervention in an execution sales places the tax collector, so far as taxes are concerned, as any other lienholder. *Jones v. Staton*, 78 Ga. App. 890, 52 S.E.2d 481 (1949).

Filing of required intervention not obviated by necessity and dignity of taxes. — Neither the fact that all parties and intervenors might be chargeable, as a matter of law with notice that taxes have not been paid, nor that taxes are, under the law, of the highest dignity, obviates the necessity of the filing of an intervention as required by the statute. *Suttles v. J.B. Withers Cigar Co.*, 194 Ga. 617, 22 S.E.2d 129 (1942).

Fact that a tax collector was not an actual party to the record does not take him out of the class of "parties interested" in the assets, so as to make the provision inapplicable to him. *Suttles v. J.B. Withers Cigar Co.*, 194 Ga. 617, 22 S.E.2d 129 (1942).

When United States government can be joined as a party in state court without consent. — While it is universally recognized that the United States, as sovereign, is immune from action except as it consents to be sued and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the action, yet where civil litigation involving conflicting claims of ownership of real and

personal property and a receivership is pending in a state court having jurisdiction of the subject matter, wherein certain parties by interventions duly allowed seek the foreclosure of mortgages and loan deeds upon real and personal property on which the United States claims a lien under jeopardy assessments issued by the Collector of Internal Revenue for unpaid income taxes, the United States may be made a

party to such proceeding under the provisions of 28 U.S.C.A. § 2410(a), by the issuance and proper service of a bar order such as is authorized under this section. *United States v. Bullard*, 209 Ga. 426, 73 S.E.2d 179 (1952).

Cited in *Chas. S. Martin Distrib. Co. v. Cooper*, 211 Ga. 64, 84 S.E.2d 1 (1954); *Buford Com. Bank v. Luker*, 126 Ga. App. 586, 191 S.E.2d 489 (1972).

OPINIONS OF THE ATTORNEY GENERAL

A tax collector cannot legally levy a tax execution against property sold at a receivership sale pursuant to court order

but he is relegated to enforcing his claim against the proceeds of the sale. 1952-53 Op. Att'y Gen. p. 205.

RESEARCH REFERENCES

ALR. — Rule as to marshaling assets as affected by homestead law, 44 ALR 758; 77 ALR 371.

Joint bank account as subject to attach-

ment, garnishment, or execution by creditor of one of the joint depositors, 11 ALR2d 1465.

23-2-98. Application of joint and individual assets to debts.

Joint assets shall be applied to joint debts, and individual assets to individual debts; but, when the joint assets are exhausted, the joint debts may come upon individual assets, the individual debts, without regard to relative dignity as compared with the joint debts, being first advanced the pro rata amount received on the joint debts from joint assets. (Orig. Code 1863, § 3085; Code 1868, § 3097; Code 1873, § 3154; Code 1882, § 3154; Civil Code 1895, § 4005; Civil Code 1910, § 4602; Code 1933, § 37-409.)

ARTICLE 6

EXERCISE OF POWERS OF APPOINTMENT, SALE, ETC.

23-2-110. Equitable jurisdiction over powers.

Powers, especially of appointment, being always founded on trust or confidence, are peculiarly subjects of equitable supervision. (Orig. Code 1863, § 3097; Code 1868, § 3109; Code 1873, § 3166; Code 1882, § 3166; Civil Code 1895, § 4017; Civil Code 1910, § 4614; Code 1933, § 37-601.)

23-2-111. Exercise of discretionary powers not compellable generally.

Equity may not compel a party, having a discretion, to exercise a power of appointment. (Orig. Code 1863, § 3098; Code 1868, § 3110; Code 1873, § 3167; Code 1882, § 3167; Civil Code 1895, § 4018; Civil Code 1910, § 4615; Code 1933, § 37-602.)

23-2-112. When faithful execution of power compellable.

In all cases where no discretion is allowed or the discretion allowed is abused, equity may compel a faithful execution of the power. (Orig. Code 1863, § 3102; Code 1868, § 3114; Code 1873, § 3171; Code 1882, § 3171; Civil Code 1895, § 4022; Civil Code 1910, § 4619; Code 1933, § 37-606.)

JUDICIAL DECISIONS

Cited in *Cowart v. Budreau*, 90 Ga. App. Parks, 117 Ga. App. 589, 161 S.E.2d 406 316, 82 S.E.2d 877 (1954); *Dockery v.* (1968).

RESEARCH REFERENCES

C.J.S. — 72 C.J.S., Powers, §§ 33 et seq., 48.

ALR. — When power to appoint property regarded as a power in trust which equity will exercise in the event of donee's failure, 80 ALR 503.

Will executed before creation of power to appoint property as an exercise of the power, 91 ALR 621.

Property covered by power of appointment as subject to claims of donee's creditors, 97 ALR 1071; 121 ALR 803.

Parties defendant to stockholder's suit to compel declaration of dividend, 15 ALR2d 1124.

23-2-113. When equity may relieve against collusive, illusory, mistaken, etc., executions.

(a) As used in this Code section, the term:

(1) "Collusive execution" means every execution whereby the person exercising a power uses it by contrivance for his own benefit, he not being legitimately an intended beneficiary.

(2) "Illusory appointment" means an appointment whereby a nominal benefit only is given to one of a class, to all of whom a substantial benefit was intended.

(b) Equity may relieve against mistaken or defective executions, collusive executions, and illusory appointments. (Orig. Code 1863,

§§ 3098, 3099, 3100; Code 1868, §§ 3110, 3111, 3112; Code 1873, §§ 3167, 3168, 3169; Code 1882, §§ 3167, 3168, 3169; Civil Code 1895, §§ 4018, 4019, 4020; Civil Code 1910, §§ 4615, 4616, 4617; Code 1933, §§ 37-602, 37-603, 37-604.)

RESEARCH REFERENCES

Am. Jur. 2d. — 62 Am. Jur. 2d, Powers, § 73. appointment as subject to claims of donee's creditors, 59 ALR 1510; 97 ALR 1071; 121 ALR 803.
C.J.S. — 72 C.J.S., Powers, § 45.
ALR. — Property covered by power of

23-2-114. Powers of sale — To be construed strictly; manner of sale; exercise by personal representative, transferee, etc.

Powers of sale in deeds of trust, mortgages, and other instruments shall be strictly construed and shall be fairly exercised. In the absence of stipulations to the contrary in the instrument, the time, place, and manner of sale shall be that pointed out for public sales. Unless the instrument creating the power specifically provides to the contrary, a personal representative, heir, heirs, legatee, devisee, or successor of the grantee in a mortgage, deed of trust, deed to secure debt, bill of sale to secure debt, or other like instrument, or an assignee thereof, or his personal representative, heir, heirs, legatee, devisee, or successor may exercise any power therein contained; and such powers may so be exercised regardless of whether or not the transfer specifically includes the powers or conveys title to the property described. A power of sale not revocable by death of the grantor or donor may be exercised after his death in the same manner and to the same extent as though the grantor or donor were in life; and it shall not be necessary in the exercise of the power to advertise or sell as the property of the estate of the deceased nor to make any mention of or reference to the death. (Civil Code 1895, § 4023; Civil Code 1910, § 4620; Code 1933, § 37-607; Ga. L. 1937, p. 481, § 1; Ga. L. 1967, p. 735, § 1.)

History of section. — The first two sentences of this section are derived from the decision in *Calloway v. People's Bank*, 54 Ga. 441 (1875).

Cross references. — As to barring of power of sale in conveyance of real property to secure debt, see § 44-14-81.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

STRICT CONSTRUCTION

EXERCISE OF POWER BY ASSIGNEE

MANNER OF SALE GENERALLY

1. IN GENERAL

2. MORTGAGE

3. ADEQUATE PRICE REQUIRED

General Consideration

The provisions of this section regarding exercise of powers of sale are applicable only to instances where a creditor is seeking to sell property to enforce the payment of a debt or demand secured by such an instrument and does not embrace a will forever disposing of the property of the testator after death, and providing, without more, for the appointment of a successor trustee. *Gilmore v. Gilmore*, 201 Ga. 770, 41 S.E.2d 229 (1947).

The words "sell" and "dispose" are synonymous when coupled together in designating a power in a will authorizing the sale and disposal of property, when accompanied by a further statement that the sale or disposition may be made at public or private sale, since such words limit the method of disposition of property to a conveyance, and they are equally synonymous when so used in a trust deed. *Lindsey v. Robinson*, 180 Ga. 648, 180 S.E. 106 (1935).

A power of sale does not authorize a trustee to transfer the title for some other purpose. *Lindsey v. Robinson*, 180 Ga. 648, 180 S.E. 106 (1935).

Payment in full of the debt renders the trust deed functus officio, and ipso facto extinguishes the power of sale. *Thurman v. Lee*, 181 Ga. 408, 182 S.E. 609 (1935).

An owner of land sold at public auction under a power of sale in a security deed has a right to come into equity whenever it appears that the purchaser or trustee made untrue representations, whereby other persons were prevented from bidding and by which the land was obtained at an undervalue. *Holbrook v. Dickson*, 195 Ga. 821, 25 S.E.2d 671 (1943).

Cited in *Sims v. Etheridge*, 169 Ga. 400, 150 S.E. 647 (1929); *Oliver v. Wayne*, 183 Ga. 316, 188 S.E. 535 (1936); *McMullen v. Carlton*, 192 Ga. 282, 14 S.E.2d 719 (1941); *Renfroe v. Butts*, 192 Ga. 720, 16 S.E.2d 551 (1941); *Delray, Inc. v. Reddick*, 194 Ga. 676, 22 S.E.2d 599 (1942); *Gurr v. Gurr*, 198 Ga. 493, 32 S.E.2d 507 (1944); *Cordell v. Cordell*, 206 Ga. 214, 56 S.E.2d 251 (1949); *Sale City Peanut & Milling Co. v. Planters & Citizens Bank*, 107 Ga. App. 463, 130 S.E.2d 518 (1963); *Tybrisa Co. v. Tybeeland, Inc.*, 220 Ga. 442, 139 S.E.2d 302 (1964); *Smith v. Taylor*, 120 Ga. App. 389, 170 S.E.2d 752 (1969); *Holderness v. Lands W., Inc.*, 232 Ga. 452, 207 S.E.2d 464 (1974); *Andrews v. Holloway*, 140 Ga. App. 622, 231 S.E.2d 548 (1976); *Moody v. Mendenhall*, 238 Ga. 689, 234 S.E.2d 905 (1977); *Roberts v. Cameron-Brown Co.*, 556 F.2d 356 (5th Cir. 1977); *Oglethorpe Co. v. United States*, 558 F.2d 590 (U.S. Ct. Cl. 1977); *Curl v. Federal Sav. & Loan Ass'n*, 241 Ga. 29, 244 S.E.2d 812 (1978); *Hartrampf v. Citizens & S. Realty Investors*, 146 Ga. App. 227, 246 S.E.2d 134 (1978); *Heard v. Decatur Fed. Sav. & Loan Ass'n*, 157 Ga. App. 130, 276 S.E.2d 253 (1980).

Strict Construction

Powers of sale in deeds to secure debt are matters of contract, and they must be strictly construed and will be enforced as written. *Verner v. McLarty*, 213 Ga. 472, 99 S.E.2d 890 (1957); *Holland v. Sterling*, 214 Ga. 583, 105 S.E.2d 894 (1958).

When by undisputed facts it appears that the sale took place on a date other than as advertised, the court did not err in granting the judgment declaring the order of confirmation null and void, and this is so

whether his judgment is considered a judgment on the pleadings, summary judgment, or judgment vacating and setting aside for a nonamendable defect appearing on the face of the record. *Hood Oil Co. v. Moss*, 134 Ga. App. 477, 214 S.E.2d 726 (1975).

While powers of sale in deeds to secure debt shall be strictly construed and exercised, where the evidence is conflicting in a suit attacking the manner in which a power of sale was being exercised, it is insufficient to show an abuse of discretion by the trial court in denying an interlocutory injunction seeking to restrain the exercise of the power. *Jones v. Camp*, 208 Ga. 164, 65 S.E.2d 596 (1951).

Powers of sale contained in deeds to secure a debt and instruments of similar nature are strictly construed and must be fairly exercised. In construing such instruments the words employed to express the intention of the parties will be given their ordinary signification, and where the language of the document is plain, its meaning will not be extended by interpretation. *Cordele Banking Co. v. Powers*, 217 Ga. 616, 124 S.E.2d 275 (1962).

A power in a security deed authorizing a sale of the property conveyed, by "party of the second part (the grantee), its agents, or legal representatives, or the sheriff of the county in which the land is situate," does not authorize a sale of the property under the power by a transferee of the grantee, under the rule of strict construction applicable to such powers. *Stewart v. Metropolitan Life Ins. Co.*, 180 Ga. 848, 181 S.E. 181 (1935).

Exercise of Power by Assignee

Formal assignment of deed effectively transfers power of sale contained in deed.

— Where a security deed, and the power of sale therein contained, were assigned by the original grantee to a new grantee with the same formality of execution as the deed itself, the power of sale therein contained was one which might properly be exercised by second grantee in the foreclosure proceedings. *Williams v. Joel*, 89 Ga. App. 329, 79 S.E.2d 401 (1953).

Where power of sale in the security deed executed prior to the act providing that a power of sale may be exercised by the assignee of the instrument was limited to

the grantee, the transferee was without power to exercise the power of sale, and consequently, transferee's deed to another in pursuance of the invalid sale did not convey any title. *Etheridge v. Boroughs*, 209 Ga. 634, 74 S.E.2d 873 (1953).

Assignee claims right to exercise powers subject to existing duties and obligations. — Assignee cannot claim the right to exercise the powers contained in the deed to secure debt conferred upon the grantee, and escape the duties and obligations resting upon the grantee in such deed. *Holland v. Sterling*, 214 Ga. 583, 105 S.E.2d 894 (1958).

When grantee accepts a warranty deed from the grantor and enters thereunder, he succeeds to all the rights and liabilities of grantor in regard to the latter's equity in the property. *Williams v. Joel*, 89 Ga. App. 329, 79 S.E.2d 401 (1953).

Payment of overplus. — Where a loan deed provides that the grantee bank, or its assigns, from the proceeds of a foreclosure sale, after reserving therefrom the principal, interest, and any other amounts due, shall pay any overplus to the grantor, or to the heirs or assigns of grantor as provided by law and the grantor has claimed the amount derived from the sale, in excess of the amount claimed by the assignee, such assignee was legally bound under the terms of the contract to pay this overplus to him, in the absence of proper proceedings by one or more of several alleged claimants to the fund to prevent such payment; the assignee could not maintain an action for interpleader, nor could its attorney. *Holland v. Sterling*, 214 Ga. 583, 105 S.E.2d 894 (1958).

Since the assignee of a loan deed would be accountable to the grantor for the disposition of the proceeds of a foreclosure sale, it may not, in order to assert that its open account comes under the provisions of the deed and is secured thereby, pay to the grantee (its assignor) in the deed interest in excess of the amount due. *Holland v. Sterling*, 214 Ga. 583, 105 S.E.2d 894 (1958).

Manner of Sale Generally

1. In General

So far as the six-months prohibition of actions against an administrator is concerned, there is no difference between

the exercise of a power of sale given in a bill of sale to secure a debt, and the foreclosure of such bill of sale by action. *Chapman v. Commercial Nat'l Bank*, 86 Ga. App. 178, 71 S.E.2d 109 (1952).

The execution of the power to sell given in a bill of sale to secure debt is not a suit against an administratrix or the estate of the deceased grantor of the power as would require a delay of six months before action can be taken. *Chapman v. Commercial Nat'l Bank*, 86 Ga. App. 178, 71 S.E.2d 109 (1952).

A power of sale in a security deed must be fairly exercised; and where from the language of an advertisement, without more, it appeared that the security deed was void for the want of a legal grantor, the sale might have been chilled by this circumstance and it should have been enjoined until better advertised. *Cock v. Bank of Dawson*, 180 Ga. 714, 180 S.E. 711 (1935).

Where a security deed stipulates that the land may be sold after "first advertising the same once a week for four successive weeks," the notice may provide a time for the sale other than the day provided for public sale. *Bush v. Growers' Fin. Corp.*, 176 Ga. 99, 167 S.E. 105 (1932).

Where the owner seeking redemption of property sold under a power of sale pleaded an agreement for redemption after sale, made with the trustee in the security deed merely for the purpose of showing that the power of sale was not fairly exercised, and of having the sale annulled, and did not seek specific performance, the petition was not demurrable (now subject to motion to dismiss) because of the agreement's indefiniteness. *Holbrook v. Dickson*, 195 Ga. 821, 25 S.E.2d 671 (1943).

If a sale by a trustee in a security deed, under a power of sale, was unauthorized, the deed was not void but was merely voidable, and hence should be treated as valid until set aside in a proper proceeding. *Fraser v. Rummele*, 195 Ga. 839, 25 S.E.2d 662 (1943).

A provision in a security deed for accelerating the maturity of the debt should not be so construed as to work hardship on the borrower, where there has

been a bona fide effort on his part to comply with his covenant, and the circumstances are such that his efforts at compliance were apparently acceptable to the lender; in such a case, when there has been no waiver of the covenant by the lender, good faith requires that he should, before undertaking to enforce the provisions of the deed accelerating the maturity of the debt for noncompliance with the terms of the covenant, afford to the borrower a reasonable opportunity to fully meet his obligations thereunder. *Tate v. Atlanta Joint Stock Land Bank*, 180 Ga. 631, 180 S.E. 112 (1935).

Refusal of a creditor to accept loan corporation bonds in lieu of cash will not afford the debtor ground for injunctive relief to prevent a duly advertised sale of land under a valid power of sale contained in security deed. *Biddle v. Papa*, 180 Ga. 468, 179 S.E. 357 (1935).

2. Mortgage

As a general proposition, the power to mortgage would seem to include in it a power to authorize the mortgagee to sell, on default of payment. *Plainvill Brick Co. v. Williams*, 170 Ga. 75, 152 S.E. 85 (1930).

A power to a mortgagee to sell property mortgaged on failure of the mortgagor to pay the debt at its maturity is a lawful power and is irrevocable, and this power may be exercised against the mortgagor and those claiming under him either by deed or as purchasers at a judicial sale under process to which the mortgage is superior in its lien. *Plainvill Brick Co. v. Williams*, 170 Ga. 75, 152 S.E. 85 (1930).

Even though power of sale in mortgage is conferred upon the grantee for the purpose of facilitating his collection of the amount of the underlying debt which is secured by the property, the power must be exercised fairly; breach of this duty to conduct the sale "fairly" gives rise to a claim for damages to the injured holder of the equity of redemption. *Kennedy v. Gwinnett Com. Bank*, 155 Ga. App. 327, 270 S.E.2d 867 (1980).

Intention of parties controls. — That portion of the mortgage containing a power of sale is to be construed so as to

effectuate the intention of the parties, and the power must be exercised in accordance with the intention of the parties as indicated in the clause in the mortgage conferring the power. *Cadwell v. Swift & Co.*, 174 Ga. 313, 162 S.E. 814 (1932).

3. Adequate Price Required

The foreclosing party has a duty to obtain that amount which results from a sale conducted according to the terms of the deed and in good faith. — In determining whether this duty under a power of sale has been breached the focus is on the manner in which the sale was conducted and not solely on the result of the sale. *Kennedy v. Gwinnett Com. Bank*, 155 Ga. App. 327, 270 S.E.2d 867 (1980).

But the foreclosing party is not an insurer of the results of his exercise of the power of sale; his only obligation is to sell according to the terms of the deed and in good faith and to obtain the amount produced by such a sale. *Kennedy v. Gwinnett Com. Bank*, 155 Ga. App. 327, 270 S.E.2d 867 (1980).

And when a power of sale is exercised all that is required of the foreclosing party is to advertise and sell the property according to the terms of the instrument, and that the sale be conducted in good faith. *Kennedy v. Gwinnett Com. Bank*, 155 Ga. App. 327, 270 S.E.2d 867 (1980).

Therefore allegations of inadequate price insufficient as basis for damages. — If foreclosure sale is conducted according to the terms of the deed and in good faith, alleged failure to obtain an "adequate" price is not a sufficient basis upon which the debtor can base a claim for damages resulting from the exercise of that power. *Kennedy v. Gwinnett Com. Bank*, 155 Ga. App. 327, 270 S.E.2d 867 (1980).

Unless price is grossly inadequate. — It is only when foreclosure sale is conducted in such a manner and under such circumstances as to result in a grossly inadequate price that the foreclosing party has breached his duty to the debtor. *Massey v. National Homeowners Sales Serv. Corp.*, 225 Ga. 93, 165 S.E.2d 854 (1969); *Kennedy v. Gwinnett Com. Bank*, 155 Ga. App. 327, 270 S.E.2d 867 (1980).

It is only when the price realized is grossly inadequate and foreclosure sale is

accompanied by either fraud, mistake, misapprehension, surprise, or other circumstances which might authorize a finding that such circumstances contributed to bringing about the inadequacy of price that the foreclosing party has breached his duty under the power of sale; it is only in these "circumstances," and not the mere failure to obtain fair market value or an "adequate" price, that a claim for damages arises against the foreclosing party for having failed to properly exercise his power of sale. *Kennedy v. Gwinnett Com. Bank*, 155 Ga. App. 327, 270 S.E.2d 867 (1980).

Where under a power of sale in a security deed the grantee in case of default was authorized to sell the land described in the deed to the highest bidder "for cash," and the sale was duly advertised and auctioned on that basis, the sale was not rendered invalid by a subsequent arrangement between such grantee and the highest bidder, whereby a note of the latter was accepted in lieu of cash, but the grantee would be accountable for the note as cash in settling with the debtor. *Dorsey v. North Am. Life Ins. Co.*, 217 Ga. 650, 123 S.E.2d 919 (1962).

Where, under a power of sale in a security deed, the grantee in case of default was authorized, on compliance with certain conditions, to sell the land described in the deed to the highest bidder "for cash," and the sale was duly advertised and auctioned on that basis, the sale was not rendered invalid by an agreement between the grantee and the highest bidder that the bidder would place a certain amount as escrow and pay the entire amount upon delivery of the deed, and in case of default would forfeit the amount deposited as escrow. *Dorsey v. North Am. Life Ins. Co.*, 217 Ga. 650, 123 S.E.2d 919 (1962).

Where under a power of sale in a security deed the grantee in case of default was authorized on compliance with certain conditions, to sell the land described in the deed to the highest bidder "for cash," and the sale was duly advertised and auctioned on that basis, the sale was not rendered invalid by a subsequent arrangement between such grantee and the highest bidder, not the result of any previous agreement or understanding, whereby a note of the latter

was accepted in lieu of cash, but the grantee would be accountable for the note as cash

in settling with the debtor. *Adcock v. Berry*, 194 Ga. 243, 21 S.E.2d 605 (1942).

RESEARCH REFERENCES

Am. Jur. 2d. — 31 Am. Jur. 2d, Executors and Administrators, § 439.

C.J.S. — 72 C.J.S., Powers, §§ 1, 24 et seq.

ALR. — Power of sale in mortgage or deed of trust as one coupled with interest, 56 ALR 224.

Power to mortgage as authorizing insertion of power of sale in mortgage, 72 ALR 158.

Power of sale as including power to mortgage, 92 ALR 882.

Mortgagee's rights in respect of assumption clause in deed as affected by invalidity or avoidability of clause as between grantor and grantee, 100 ALR 911.

Power of court to sell property in mortgage enforcement suit, or propriety of sale, as affected by opposition of mortgagee or trustee on whom mortgage or deed of trust confers discretion, 103 ALR 1440.

Power of court to authorize pledge or other disposal of property in manner not

authorized by trust deed or trust agreement securing bonds or participation certificates, 105 ALR 195.

Exercise of power of sale in mortgage during pendency of suit to foreclose, 107 ALR 721.

Power to appoint realty in fee or personally absolutely as including power to appoint lesser estate or interest, 121 ALR 139.

Doctrine of equitable conversion as affected by discretion as to time, manner or other circumstances of sale, where the duty to sell is mandatory, 124 ALR 1448.

Power of sale conferred on executor by testator as authorizing private sale, 11 ALR2d 955.

Foreclosure sale or mortgaged real estate as a whole or in parcels, 61 ALR2d 505.

Mortgages: effect upon obligation of guarantor or surety of statute forbidding, or restricting deficiency judgments, 49 ALR3d 554.

23-2-115. Same — When private sale authorized.

Unless expressly limited in a will, deed, or other instrument creating a power of sale or unless specifically otherwise provided in such instrument, a power of sale conferred upon an executor, trustee, guardian, or attorney in fact shall authorize a private sale by the executor, trustee, guardian, or attorney in fact, with or without advertisement and on such terms and conditions as the donee of the power may deem advisable, without the necessity of applying for leave to sell or obtaining any order therefor from any court; provided, however, that this Code section shall not apply to powers of sale in security deeds, mortgages, trust deeds, bills of sale, and other instruments conveying property or creating a lien thereon, to secure a debt or debts. (Ga. L. 1955, p. 430, § 1.)

RESEARCH REFERENCES

C.J.S. — 72 C.J.S., Powers, § 24 et seq.

ALR. — Doctrine of equitable conversion as affected by discretion as to

time, manner or other circumstances of sale, where the duty to sell is mandatory, 124 ALR 1448.

23-2-116. Same — When exercisable by successor administrator, trustee, etc.

Unless expressly limited in an instrument creating a power of sale or unless specifically otherwise provided in the instrument, the power of sale conferred upon an executor, trustee, or guardian may be exercised and executed by an administrator with the will annexed or by a successor administrator, trustee, or guardian. If the power is conferred upon more than one executor, trustee, or guardian, the surviving or remaining executor or executors, trustee or trustees, or guardian or guardians may exercise and execute the power. (Ga. L. 1955, p. 430, § 2.)

23-2-117. Release, relinquishment, or covenant as to exercise of power of appointment — Authorized.

Any person holding a power of appointment, general or special, whether exercisable by deed or by will only or otherwise, and whether reserved by the holder of the power or conferred upon him by another, may, as to all or any part of the property covered by the power of appointment, release or relinquish the power completely, or may release or relinquish the right to exercise the power except among a limited class set out in the release or relinquishment, or may covenant that the power will be exercised only in favor of the members of a limited class; and any such release, relinquishment, or covenant executed and delivered as provided in Code Sections 23-2-118 and 23-2-119 shall be valid and binding, whether with or without a consideration, provided that no such release, relinquishment, or covenant shall have the effect of permitting the property to be appointed to a person not permitted by the original power. (Ga. L. 1945, p. 340, § 1.)

JUDICIAL DECISIONS

Cited in *Browne v. Hendley*, 216 Ga. 411, 116 S.E.2d 537 (1960).

RESEARCH REFERENCES

Am. Jur. 2d. — 62 Am. Jur. 2d, Powers, §§ 17, 18.

C.J.S. — 72 C.J.S., Powers, § 19.

ALR. — Statute preventing lapse upon death of legatee or devisee leaving issue as applicable to power of appointment, 75 ALR 1383.

Execution, by donee of power, of deed, mortgage, or will not referring to the

power, as exercise thereof, 91 ALR 433; 127 ALR 248.

Nonexclusive powers and illusory appointments, 100 ALR 343.

Right to delegate power to appoint property, 104 ALR 1459.

Power to appoint as exercisable by creation of new power by donee, 169 ALR 727.

Election to take against will as extinguishing power of appointment, 38 ALR2d 977.

Power of appointment as exclusive or nonexclusive — modern views, 69 ALR2d 1285.

Effect of statute upon determination whether disposition of all or residue of

testator's property, without referring to power of appointment, sufficiently manifests intention to exercise power, 16 ALR3d 911.

Powers of appointment: revocation or amendment of exercise of power to appoint future interest, after exercise by inter vivos instrument, 60 ALR3d 143.

23-2-118. Same — To be in writing; delivery or recordation.

Any release, relinquishment, or covenant referred to in Code Section 23-2-117 shall be in writing, signed by the person holding the power, and delivered to anyone interested in the power, including any person in the limited class, or to any fiduciary holding the property or any part thereof, or recorded in the office of the clerk of the superior court of the county in which the property or any part thereof is located. (Ga. L. 1945, p. 340, § 2.)

23-2-119. Same — When fiduciaries or bona fide purchasers affected.

No fiduciary holding or distributing any property subject to a power of appointment as referred to in Code Section 23-2-117 shall be deemed to have notice of the release, relinquishment, or covenant or be bound thereby unless and until a copy thereof is delivered to the fiduciary. No bona fide purchaser purchasing the property shall be affected by the release, relinquishment, or covenant unless he has notice thereof or unless the release, relinquishment, or covenant has been recorded in the office of the clerk of the superior court of the county in which the property is located. (Ga. L. 1945, p. 340, § 3.)

RESEARCH REFERENCES

ALR. — Nonexclusive powers and illusory appointments, 100 ALR 343.

Validity of exercise of power of appointment as affected by purpose, request, agreement, or condition that appointee benefit, or knowledge that he intends to

benefit, one not an object of the power, 115 ALR 930.

Power to appoint realty in fee or personalty absolutely as including power to appoint lesser estate or interest, 94 ALR3d 895.

23-2-120. Application of Code Sections 23-2-117 through 23-2-119.

Code Sections 23-2-117 through 23-2-119 are declaratory of existing law and apply to all such releases, relinquishments, and covenants, whenever executed. (Ga. L. 1945, p. 340, § 4.)

ARTICLE 7

NONPERFORMANCE OF CONTRACT

Cross references. — As to effect of decree for specific performance as deed to convey land or other property, see § 9-11-70. As to right of buyer to specific performance in regard to contract for sale of goods, see § 11-2-716.

23-2-130. When specific performance decreed, generally.

Specific performance of a contract, if within the power of the party, will be decreed, generally, whenever the damages recoverable at law would not be an adequate compensation for nonperformance. (Orig. Code 1863, § 3118; Code 1868, § 3130; Code 1873, § 3186; Code 1882, § 3186; Civil Code 1895, § 4036; Civil Code 1910, § 4633; Code 1933, § 37-801.)

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
PROOF OF CONTRACT
SUBSTANTIAL COMPLIANCE
PLEADING AND PRACTICE

General Consideration

This section includes parol as well as written contracts. Valdosta Mach. Co. v. Finley, 164 Ga. 706, 139 S.E. 337 (1927); Richards v. Plaza Hotel, Inc., 171 Ga. 827, 156 S.E. 809 (1931).

Enforcement of oral contract. — An oral contract by the terms of which a person agrees for a valuable consideration that he will make a will giving property to the other contracting party may be enforced by specific performance in this state. First Nat'l Bank & Trust Co. v. Falligant, 208 Ga. 479, 67 S.E.2d 473 (1951).

Alleged oral contract by decedent to provide a college education for child and give jewels to her at decedent's death, if child were named after her, did not measure up to the strict rules of law governing suits to specifically perform alleged contracts of this kind. First Nat'l Bank & Trust Co. v. Falligant, 208 Ga. 479, 67 S.E.2d 473 (1951).

Inadequacy of relief at law essential to equitable relief. — To obtain equitable relief, plaintiff must allege some element or feature of the contract or in the conduct of the defendant to show that the relief at law would not be adequate; he may show that in case the contract is not specifically performed, his damages will be irreparable, or he may show that the measure of damages resulting from the nonperformance of the contract is uncertain or difficult of ascertainment; he may show that the thing contracted for has some intrinsic or special value, such as is possessed by an heirloom, having a special and peculiar value to its owner over and above any market value that can be placed upon it in accordance with strict legal rules; or he may show that the property, though personal, is not of common class, but is unique of its kind, and cannot be readily reproduced, so that others of a similar nature and equal value cannot be procured by damages assessed by means of legal rules, as is the case with

paintings or other works of art. *Gabrell v. Byers*, 178 Ga. 16, 172 S.E. 227 (1933).

Where the landlord covenants to maintain the roof in good repair but fails to do so, the remedy of the tenant is to make the repairs himself and look to the landlord for reimbursement, or to occupy the premises without repair and hold the landlord responsible for damages by action or by recoupment to an action for the rent, which remedies are adequate at law. *Borochoff Properties, Inc. v. Creative Printing Enterprises*, 233 Ga. 279, 210 S.E.2d 809 (1974).

As a general rule, equity will not decree specific performance of contracts relating to personal property. *Black v. American Vending Co.*, 239 Ga. 632, 238 S.E.2d 420 (1977).

An agreement for equal division of property is one which equity will specifically perform since land is involved and damages would not be adequate to compensate for nonperformance. *Hancock v. Hancock*, 223 Ga. 481, 156 S.E.2d 354 (1967).

A contract which does not provide for a down payment can nevertheless be specifically enforced. *Beller & Gould v. Lisenby*, 246 Ga. 15, 268 S.E.2d 611 (1980).

Cited in *Watters v. Southern Brighton Mills*, 168 Ga. 15, 147 S.E. 87 (1929); *Gabrell v. Byers*, 178 Ga. 16, 172 S.E. 227 (1933); *Hill v. Shaw*, 189 Ga. 294, 5 S.E.2d 778 (1939); *Averitt v. Swainsboro Methodist Church*, 190 Ga. 549, 9 S.E.2d 888 (1940); *Savannah Bank & Trust Co. v. Wolff*, 191 Ga. 111, 11 S.E.2d 766 (1940); *O'Rear v. Lamb*, 194 Ga. 455, 22 S.E.2d 74 (1942); *Hotel Candler, Inc. v. Candler*, 198 Ga. 339, 31 S.E.2d 693 (1944); *Silverman v. Alday*, 200 Ga. 711, 38 S.E.2d 419 (1946); *Washington Mfg. Co. v. Wickersham*, 201 Ga. 635, 40 S.E.2d 206 (1946); *Pearson v. George*, 209 Ga. 938, 77 S.E.2d 1 (1953); *Whiteway Neon-Ad, Inc. v. Maddox*, 211 Ga. 27, 83 S.E.2d 676 (1954); *Morgan v. Maddox*, 216 Ga. 816, 120 S.E.2d 183 (1961); *Vowell v. Carmichael*, 235 Ga. 387, 219 S.E.2d 732 (1975); *Heath v. Stinson*, 238 Ga. 364, 233 S.E.2d 178 (1977).

Proof of Contract

A plaintiff seeking to enforce a contract to make a will giving property to him must prove the precise contract beyond a rea-

sonable doubt. *Mann v. Moseley*, 208 Ga. 420, 67 S.E.2d 128 (1951).

Requirement of certainty. — A court will not decree the specific performance of a contract for the sale of land unless there is a definite and specific statement of the terms of the contract. The requirement of certainty extends not only to the subject matter and purpose of the contract, but also to the parties, consideration, and even the time and place of performance, where these are essential. *Williams v. Manchester Bldg. Supply Co.*, 213 Ga. 99, 97 S.E.2d 129 (1957); *Duvall v. Cox*, 215 Ga. 163, 109 S.E.2d 593 (1959).

A court will not decree specific performance of a contract which is indefinite and uncertain in any material provision, or where the parties are not specified, or where, in case of lands or interest in lands, the description thereof, or key found therein, is insufficient to identify the same. *Bacon v. Bacon*, 176 Ga. 191, 167 S.E. 107 (1932); *Cashin v. Markwalter*, 208 Ga. 444, 67 S.E.2d 226 (1951).

A description of land as being parts of two named lots in certain district and section of county, that lie north of lessor's present place of business, bounded on the east by highway, on the north by the county line, on the west by lessor's lands, and on the south by the lands of another individual, is too indefinite to support a decree for possession of the lands by the lessee in an equitable action against the lessor. *Harris v. Abney*, 208 Ga. 518, 67 S.E.2d 724 (1951).

Contract for sale of all of the land known as *Wilkinson Pond*, consisting of 25 acres, more or less, with the exception of three acres, more or less, to be set aside as a home place containing the *Wilkinson* home, was void for want of necessary description of any particular land, and afforded no sufficient basis for the extraordinary equitable relief of specific performance. *Smith v. Wilkinson*, 208 Ga. 489, 67 S.E.2d 698 (1951).

Release agreement giving plaintiff option of selecting two acres on east side for release was not too indefinite to be specifically enforced. *Jarrard v. Lawson*, 244 Ga. 419, 260 S.E.2d 329 (1979).

Specific performance of a contract will not be decreed unless the contract is definite and specific, based upon a sufficient

legal consideration, and the proof of it is strong, clear, and satisfactory; if the contract is one entire contract, and one portion of the contract is indefinite, the entire contract fails. *First Nat'l Bank & Trust Co. v. Falligant*, 208 Ga. 479, 67 S.E.2d 473 (1951).

A contract upon which specific performance is sought must be certain, definite, and clear, and so precise in its terms that neither party can reasonably misunderstand it. *Bullard v. Bullard*, 202 Ga. 769, 44 S.E.2d 770 (1947); *Wehunt v. Pritchett*, 208 Ga. 441, 67 S.E.2d 233 (1951); *Harris v. Trippi*, 209 Ga. 369, 72 S.E.2d 704 (1952).

Where the terms of an option were so vague, uncertain, and indefinite as to be incapable of enforcement, the petition failed to set forth a cause of action for specific performance. *Erwin v. Hardin*, 187 Ga. 275, 200 S.E. 159 (1938); *Williams v. Manchester Bldg. Supply Co.*, 213 Ga. 99, 97 S.E.2d 129 (1957).

A petition requesting specific performance of a contract for the sale of land which contains no allegation showing the value of the property involved so as to enable this court to determine whether or not the contract is fair, just, and equitable and can, in good conscience, be decreed to be specifically performed, fails to state a cause of action for specific performance. *Crown Corp. v. Galanti*, 220 Ga. 660, 140 S.E.2d 898 (1965).

To constitute a valid sale of real estate which a court will require to be specifically performed, the following are the essentials to the contract of such sale: (1) the memorandum of contract must specify the parties, that is, the seller and the buyer; (2) the memorandum must sufficiently describe the subject matter of the contract; and (3) the memorandum must name the consideration. The consideration need not be expressly stated if the memorandum of contract furnishes a key by which the amount of the purchase price can be ascertained. If the consideration is not all to be paid in cash, then the times and amounts of deferred payments must be specified. When the contract expressly states the amount of purchase money or furnishes a key by which it can be ascertained, then the contract is sufficient.

Beller & Gould v. Lisenby, 246 Ga. 15, 268 S.E.2d 611 (1980).

Requirement of mutuality of contract. — If, in a contract for the sale of real estate, the initial payment of the purchase money is contingent upon an event which may or may not happen, at the pleasure of the buyer, the contract lacks mutuality, and this deficiency is not remedied by a subsequent offer by the seller to perform an act which he was not bound in the contract to perform. *F. & C. Inv. Co. v. Jones*, 210 Ga. 635, 81 S.E.2d 828 (1954).

Substantial Compliance

Specific performance may properly be refused if a substantial part of the agreed exchange for the performance to be compelled is as yet unperformed and its concurrent or future performance is not well secured to the satisfaction of the court. *F. & C. Inv. Co. v. Jones*, 210 Ga. 635, 81 S.E.2d 828 (1954).

The person seeking specific performance of a contract to make a will giving property to him must show, in addition to the contract, a substantial compliance with his part of the agreement. *Mann v. Moseley*, 208 Ga. 420, 67 S.E.2d 128 (1951).

Tender of purchase price. — While there must be a tender of the purchase price before equity will decree specific performance of a contract for the sale of land, where the petition alleges that the defendants, when notified by the plaintiff that he had purchased from original party his contract with them for the sale of the property, repudiated the contract, notified him that they had no intention of complying with its terms, and that they would refuse to accept the tender of any money under the contract, the tender is waived. *Gilleland v. Welch*, 199 Ga. 341, 34 S.E.2d 517 (1945); *Todd v. Bivins*, 215 Ga. 402, 110 S.E.2d 768 (1959).

Before equity will decree specific performance of a contract for the sale of land at the instance of the purchaser, there must, in the absence of waiver, be an unconditional tender of the purchase price. *Gilleland v. Welch*, 199 Ga. 341, 34 S.E.2d 517 (1945).

Where a petitioner sought specific performance of a conditional contract for the

purchase of a described house and lot, but the petition failed to allege that the express condition had been met, no right to the relief sought was set forth. *Wehunt v. Pritchett*, 208 Ga. 441, 67 S.E.2d 233 (1951).

Where a contract for the purchase of land provided that the purchaser, upon obtaining a deed from the seller, would execute a deed to secure an unpaid balance of the purchase price, and the seller's deed was delivered, but the purchaser refused to execute the security deed, equity would have jurisdiction of a suit by the seller for specific performance, to enforce the terms of the purchaser's agreement. *Waters v. Tillman*, 194 Ga. 552, 22 S.E.2d 173 (1942).

Pleading and Practice

Specific performance and damages are not inconsistent remedies, and may be pursued in the same action. *Loewus v. Eskridge & Downing, Inc.*, 175 Ga. 456, 165 S.E. 576 (1932).

Specific performance is not a remedy which either party may claim as a matter of absolute right, and mere inadequacy of price, or any other fact showing the contract to be unfair, unjust, or against

good conscience, may justify the refusal of this remedy. *Whitehead v. Dillard*, 178 Ga. 714, 174 S.E. 244 (1934); *Wehunt v. Pritchett*, 208 Ga. 441, 67 S.E.2d 233 (1951).

Where a contract for the sale of land is in writing, is certain and fair in all its parts, is for an adequate consideration, and capable of being performed, it is just as much a matter of course for a court to decree a specific performance of it as it is for a court to give damages for it in other cases. *Jones v. Smith*, 206 Ga. 162, 56 S.E.2d 462 (1949).

Allegations necessary to defeat motion requesting dismissal of petition. — A petition for specific performance of a contract for the sale of land, is sufficient as against general demurrer (now motion to dismiss), where it is alleged that the contract is in writing, signed by both of the parties, is certain and fair, and is for an adequate consideration and capable of being performed. *Scheer v. Doss*, 211 Ga. 7, 83 S.E.2d 612 (1954); *Todd v. Bivins*, 215 Ga. 402, 110 S.E.2d 768 (1959).

A court will not render a decree which is impossible of performance, or which the court has no power to enforce. *Gabrell v. Byers*, 178 Ga. 16, 172 S.E. 227 (1933).

RESEARCH REFERENCES

Am. Jur. 2d. — 71 Am. Jur. 2d, Specific Performance, § 8.

C.J.S. — 81 C.J.S., Specific Performance, § 6 et seq.

ALR. — Right of party who has once refused to perform to have specific performance of contract, 2 ALR 416.

Dismissal of suit as affecting election of remedies as between damages and specific performance, 26 ALR 111.

Specific performance of written executory contract for lease of real property, 31 ALR 502; 173 ALR 1161.

A provision in land contract for pecuniary forfeiture or penalty by a party in default as affecting the right of the other party to specific performance, 32 ALR 584; 98 ALR 887.

Right of beneficiary to enforce contract between third persons to provide for him by will, 33 ALR 739; 73 ALR 1395.

Infancy of party to contract as affecting his right to specific enforcement, 43 ALR 120.

Obligation of assignee to vendor to perform contract on assignment by purchaser of contract to sell real property, 59 ALR 954.

Specific performance of a contract as a matter of right, 65 ALR 7.

Remedies during promisor's lifetime for breach of agreement to give property at death, 66 ALR 1439.

Right to return in specie of the consideration received by a political subdivision under an invalid or unenforceable contract, or to declaration of trust or other right in respect of property into which consideration has been converted, 93 ALR 441.

Remedy by mandatory injunction or specific performance for breach of contract

to furnish one the requirements of his business, 98 ALR 421.

Right to specific performance, or injunction against breach, of lease or sublease or of contract to make lease as affected by right of complainant to cancel lease before expiration of term for which other party is bound, 117 ALR 256.

Specific performance of contract for sale of corporate stock, 130 ALR 920.

Specific performance of contract for services, 135 ALR 279.

Remedy of specific performance as available to vendee's assignee, 138 ALR 205.

Contract for exclusive distribution or sales agency as subject of suit for specific performance, 145 ALR 684.

Specific performance, or other equitable enforcement, of agreement for wife's support or alimony, 154 ALR 323.

Insolvency of defendant as a reason for denying specific performance, 154 ALR 1201.

Specific performance or injunction as proper remedy for breach of collective bargaining agreement, 156 ALR 652.

Specific performance, or injunction against breach, of contract for organization or reorganization of corporation, 158 ALR 997.

Specific performance of contracts requiring building or construction, 164 ALR 802.

Remedies during promisor's lifetime on contract to convey or will property at death in consideration of support or services, 7 ALR2d 1166.

Specific performance: compensation or damages awarded purchaser for delay in conveyance of land, 7 ALR2d 1204.

Specific performance or injunctive relief against breach of contract, other than lease or agreement therefor, or contract for services, terminable by one party but not the

other, 8 ALR2d 1208.

Option executed simultaneously with mortgage for purchase of mortgaged property by mortgagee as subject of specific performance, 10 ALR2d 231.

Change of conditions after execution of contract or option for sale of real property as affecting right to specific performance, 11 ALR2d 390.

Mutuality of remedy as essential to granting of specific performance, 22 ALR2d 508.

Specific performance of provisions of separation agreement other than those for support or alimony, 44 ALR2d 1091.

Specific performance of compromise and settlement agreement, 48 ALR2d 1211.

Uncertainty as to terms of mortgage or of accompanying note or bond contemplated by real-estate sales contract as affecting right to specific performance, 60 ALR2d 251.

Specific performance: requisite definiteness of provision in contract for sale or lease of land, that vendor or landlord will subordinate his interest to permit other party to obtain financing, 26 ALR3d 855.

Purchaser's misrepresentations as to intended use of real property as ground for vendor's equitable relief from contract and deed, 35 ALR3d 1369.

Specific performance of lease of, or binding option to lease, building or part of building to be constructed, 38 ALR3d 1052.

Specific performance of agreement for sale of private franchise, 82 ALR3d 1102.

Specific performance of agreement to lend or borrow money, 82 ALR3d 1116.

Requirements as to certainty and completeness of terms of lease in agreement to lease, 85 ALR3d 414.

23-2-131. When specific performance of parol contract for land decreed; sufficient part performance.

(a) The specific performance of a parol contract as to land shall be decreed if the defendant admits the contract or if the contract has been so far executed by the party seeking relief and at the instance or by the inducements of the other party that if the contract were abandoned he could not be restored to his former position.

(b) Full payment alone accepted by the vendor, or partial payment accompanied with possession, or possession alone with valuable improvements, if clearly proved in each case to have been done with reference to the parol contract, shall be sufficient part performance to justify a decree. (Orig. Code 1863, § 3119; Code 1868, § 3131; Code 1873, § 3187; Code 1882, § 3187; Civil Code 1895, § 4037; Civil Code 1910, § 4634; Code 1933, § 37-802.)

Cross references. — As to form of complaint for specific performance of written contract to convey land, see § 9-11-112.

23-2-132. When voluntary agreement enforced.

Specific performance will not be decreed of a voluntary agreement or merely gratuitous promise. If, however, possession of lands has been given under such an agreement, upon a meritorious consideration, and valuable improvements have been made upon the faith thereof, equity will decree the performance of the agreement. (Orig. Code 1863, § 3121; Code 1868, § 3133; Code 1873, § 3189; Code 1882, § 3189; Civil Code 1895, § 4039; Civil Code 1910, § 4636; Code 1933, § 37-804.)

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
PROOF GENERALLY
MERITORIOUS CONSIDERATION
VALUABLE IMPROVEMENTS

General Consideration

Possession, etc., must be based on oral contract or promise. — Where possession and valuable improvements are relied upon for specific performance they must have been by virtue of and on the faith of the oral contract or promise so as to take the case out of the statute of frauds and constitute the equivalent of a writing by showing acts unequivocally referring to the alleged contract or promise. The burden rests on the alleged promisee to bring his case within these facts if he does not show other exceptions under § 23-2-131; and without such proof he is not entitled to specific performance. *Taylor v. Cureton*, 196 Ga. 28, 25 S.E.2d 815 (1943).

Oral gift of land becomes complete and irrevocable when donee takes possession of donated premises and, on faith of the gift, makes valuable improvements; and, as against the donor and those claiming under him with notice, a completed gift of land invests the donee with a perfect equitable title. *Sharpton v. Givens*, 209 Ga. 868, 76 S.E.2d 806 (1953); *Owens v. White*, 218 Ga. 1, 126 S.E.2d 425 (1962).

Legal title does not pass merely by parol gift and making of improvements. A decree of specific performance is necessary to pass the legal title. *Doe v. Newton*, 171 Ga. 418, 156 S.E. 25 (1930); *Beetles v. Steadham*, 186 Ga. 110, 197 S.E. 270 (1938).

Laches will bar petition for specific performance by one who claims land under voluntary conveyance. *Prater v. Sears*, 77 Ga. 28 (1886).

As a general rule, equity will not decree specific performance of contracts relating to personal property. *Black v. American Vending Co.*, 239 Ga. 632, 238 S.E.2d 420 (1977).

Thus gratuitous promise by insured to give his life insurance to his estate cannot be specifically enforced. *Nally v. Nally*, 74 Ga. 669, 58 Am. R. 458 (1885).

Agreement to settle family controversy will not be considered voluntary and without consideration, but will be enforced in equity as a fair family arrangement independent of its being a compromise of doubtful rights. *Jones v. Robinson*, 172 Ga. 746, 158 S.E. 752 (1931).

Party not entitled to have contract of gratuitous offer to lease specifically performed. *R.A.C. Realty Co. v. W.O.U.F. Atlanta Realty Corp.*, 205 Ga. 154, 52 S.E.2d 617 (1949).

Cited in *Chan v. Judge*, 36 Ga. App. 13, 134 S.E. 925 (1926); *Burt v. Gooch*, 37 Ga. App. 301, 139 S.E. 912 (1927); *Payne v. Thebaut*, 180 Ga. 758, 180 S.E. 725 (1935); *Kendrick v. Blackwell*, 189 Ga. 225, 5 S.E.2d 633 (1939); *Trustees of Jesse Parker Williams Hosp. v. Nisbet*, 189 Ga. 807, 7 S.E.2d 737 (1940); *Moore v. Segars*, 192 Ga. 190, 14 S.E.2d 752 (1941); *Johns v. Nix*, 194 Ga. 152, 20 S.E.2d 758 (1942); *Holton v. Mercer*, 195 Ga. 47, 23 S.E.2d 166 (1942); *Jones v. Jones*, 196 Ga. 492, 26 S.E.2d 602 (1943); *Christopher v. Whitmire*, 199 Ga. 280, 34 S.E.2d 100 (1945); *North v. Tolbert*, 80 Ga. App. 110, 55 S.E.2d 661 (1949); *Matlock v. Duncan*, 220 Ga. 200, 137 S.E.2d 661 (1964).

Proof Generally

Burden of proof generally. — Evidence which shows all of the requirements necessary to establish a complete equity to land under a parol gift can be offered as a defense to a dispossessory proceeding. The establishment of a complete equity shifts to the plaintiffs the burden of showing some superior right or title to defeat or overcome the defendant's right. *Ogden v. Dodge County*, 97 Ga. 461, 25 S.E. 321 (1895); *Holton v. Mercer*, 65 Ga. App. 53, 15

S.E.2d 253 (1941); *Milton v. Milton*, 192 Ga. 778, 16 S.E.2d 573 (1941).

Where title is claimed by virtue of provisions of this section, parol gift thus asserted must be established by evidence which shows its existence beyond reasonable doubt. *Causey v. Causey*, 224 Ga. 458, 162 S.E.2d 372 (1968).

Contract must be certain. — The terms of a gift or parol contract "should be established so clearly, strongly and satisfactorily as to leave no reasonable doubt as to the agreement." *Harden v. Morton*, 195 Ga. 471, 24 S.E.2d 685 (1943).

Petition under this section for specific performance of promise to convey land, to be sufficient as against demurrer (now motion to dismiss), must allege: (1) the promise to give, (2) a meritorious consideration, (3) possession in his own right by the donee, and (4) the making of valuable improvements. *Mankin v. Bryant*, 206 Ga. 120, 56 S.E.2d 447 (1949); *Yates v. Yates*, 214 Ga. 843, 108 S.E.2d 330 (1959).

In order to prevail under this section, it is necessary to establish each of its requirements to authorize a decree of performance of the parol gift; furthermore, where title is claimed by virtue of this section, the parol gift thus asserted must be established by evidence which shows its existence beyond a reasonable doubt. *Taylor v. Cureton*, 196 Ga. 28, 25 S.E.2d 815 (1943); *Causey v. Causey*, 224 Ga. 458, 162 S.E.2d 372 (1968); *Brown v. Truluck*, 239 Ga. 105, 236 S.E.2d 60 (1977).

Possession of land under a voluntary agreement, based upon a meritorious consideration, with valuable improvements made upon the faith thereof, will invest the holder with such right or equity that he cannot be ousted by the donor, or by a purchaser from him with notice. However, a mere parol gift is not, without more, sufficient to pass title, nor will it vest in the donee any right or equity as against a subsequent purchaser from the donor, with or without notice. *Beetles v. Steadham*, 186 Ga. 110, 197 S.E. 270 (1938).

A parol gift of land in praesenti, based upon a meritorious consideration and accompanied by possession, but with no valuable improvements made upon the land during the lifetime of the alleged donor, will not authorize a decree of title in

the donee. *Mulligan v. Mulligan*, 201 Ga. 444, 39 S.E.2d 699 (1946).

In action to enjoin trespass on a certain acre of land, where plaintiff's predecessor in title had orally given the land to a church for cemetery uses, pursuant to which gift corner stakes and lines were set up and two graves placed thereon, and there was testimony that plaintiff prior to his purchase of larger tract of which the acre was a part was informed of this gift and saw the graves, a verdict for the defendants was authorized by the evidence. *Sharpton v. Givens*, 209 Ga. 868, 76 S.E.2d 806 (1953).

Meritorious Consideration

Natural affection as meritorious consideration. — In an action for specific performance of an alleged parol promise to give land, the natural love and affection of a father for his son supplies the element of meritorious consideration. *Milton v. Milton*, 192 Ga. 778, 16 S.E.2d 573 (1941).

Damage or trouble to the promisee, as well as benefit to the promisor, is a sufficient consideration to support a promise. *Mankin v. Bryant*, 206 Ga. 120, 56 S.E.2d 447 (1949).

Valuable Improvements

Section requires permanent and benefi-

cial improvements. — Slight improvements of small value, if they are substantial and permanent in their nature and are beneficial to the land, in other words, if they are such as an owner would ordinarily make upon the land under like circumstances, then these improvements are sufficient to comply with the requirements that plaintiff made valuable improvements. *Davis v. Newton*, 215 Ga. 58, 108 S.E.2d 809 (1959).

Where petition alleged that plaintiff, relying upon the promise of the corporation to convey to him certain property, went into possession thereof and made valuable improvements thereon, it alleges a benefit to the corporation by reason of the enhancement in value of its remaining property because of the valuable improvements made by the plaintiff, and an injury to the plaintiff, by reason of the valuable improvements made by him in reliance upon the promise. *Mankin v. Bryant*, 206 Ga. 120, 56 S.E.2d 447 (1949).

Sufficiency of improvements which donee must have made to complete parol gift of land is question for jury to determine. *Sharpton v. Givens*, 209 Ga. 868, 76 S.E.2d 806 (1953); *Barfield v. Hilton*, 235 Ga. 407, 219 S.E.2d 719 (1975).

RESEARCH REFERENCES

C.J.S. — 81 C.J.S., Specific Performance, § 46.

ALR. — Early death of vendor as affecting enforcement of contract to convey in consideration of contract for his or her support for life, 49 ALR 601.

Broker's right to commission where

customer repudiates or fails to complete contract or promise which is oral or not specifically enforceable, 12 ALR2d 1410.

Validity and enforceability of contract which expressly leaves open for future agreement or negotiation the terms of payment for property, 68 ALR2d 1221.

23-2-133. Refusal of decree for inadequacy of price, unfairness, etc.

Mere inadequacy of price, though not sufficient to rescind a contract, may justify a court in refusing to decree a specific performance, as may any other fact showing the contract to be unfair, unjust, or against good conscience. (Orig. Code 1863, § 3122; Code 1868, § 3134; Code 1873, § 3190; Code 1882, § 3190; Civil Code 1895, § 4040; Civil Code 1910, § 4637; Code 1933, § 37-805.)

Law reviews. — For comment on *Jones v. Smith*, 206 Ga. 162, 56 S.E.2d 462 (1949), see 12 Ga. B.J. 333 (1950).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
INADEQUACY OF PRICE GENERALLY
DETERMINATION OF FAIRNESS

General Consideration

This section embraces more than inadequacy of price; it also covers fairness of contract as to both parties. *Jones v. Smith*, 206 Ga. 162, 56 S.E.2d 462 (1949), commented on in 12 Ga. B.J. 333 (1950); *Horner v. Savannah Valley Enterprises, Inc.*, 234 Ga. 371, 216 S.E.2d 113 (1975).

Specific performance is not remedy which either party can demand as matter of absolute right, and will not in any given case be granted unless strictly equitable and just. *Bullard v. Bullard*, 202 Ga. 769, 44 S.E.2d 770 (1947); *Jones v. Smith*, 206 Ga. 162, 56 S.E.2d 462 (1949); *Treadwell v. Treadwell*, 216 Ga. 156, 115 S.E.2d 535 (1960).

One who seeks aid of equity must come into court with clean hands. *Byck v. Lawton*, 218 Ga. 858, 131 S.E.2d 176 (1963).

Where family settlement is involved, court will not inquire into adequacy or inadequacy of consideration. *Hancock v. Hancock*, 223 Ga. 481, 156 S.E.2d 354 (1967).

When equity takes jurisdiction to give specific performance it will retain it until full and satisfactory justice is accomplished between the parties. *McDonald v. Davis*, 43 Ga. 356 (1871); *Miller v. Watson*, 139 Ga. 29, 76 S.E. 585 (1912).

Cited in *Hulgan v. Gledhill*, 207 Ga. 349, 61 S.E.2d 473 (1950); *Bailey v. Bell*, 208 Ga. 715, 69 S.E.2d 272 (1952); *Payne v. Jones*, 211 Ga. 322, 86 S.E.2d 3 (1955); *Sikes v. Sims*, 212 Ga. 391, 93 S.E.2d 6 (1956); *Burnam v. Wilkerson*, 220 Ga. 590, 140 S.E.2d 871 (1965); *Abdill v. Barden*, 221 Ga. 591, 146 S.E.2d 299 (1965); *Anthony v. Morris Hyles, Inc.*, 221 Ga. 847,

148 S.E.2d 326 (1966); *Logan v. Phillips*, 222 Ga. 714, 152 S.E.2d 384 (1966); *Logan v. Logan*, 223 Ga. 574, 156 S.E.2d 913 (1967); *Penta Invs., Inc. v. Robertson*, 230 Ga. 401, 197 S.E.2d 358 (1973); *Deal v. Dickson*, 231 Ga. 366, 202 S.E.2d 41 (1973); *Moore v. Buiso*, 235 Ga. 730, 221 S.E.2d 414 (1975).

Inadequacy of Price Generally

Specific performance of contract may be refused where consideration is inadequate, though the court will not rescind it under this section. *Hunt v. Jackson Formby's Guardian*, 43 Ga. 79 (1871).

Court should not deny decree for specific performance merely upon ground of inadequacy of consideration, unless there is such a gross disparity of consideration as to shock the moral conscience and to amount in itself to evidence of fraud, the adequacy of consideration being generally a matter to be determined by the parties for themselves. *Whitehead v. Dillard*, 178 Ga. 714, 174 S.E. 244 (1934); *McLoon v. McLoon*, 220 Ga. 18, 136 S.E.2d 740 (1964).

But specific performance may be denied where gross inadequacy shown. — Where the inadequacy of price is so great as to give to the contract the character of unreasonableness and hardship, the court and jury will stay the exercise of their discretionary power in enforcing a specific performance. *Hotaling v. Anderson*, 226 Ga. 327, 175 S.E.2d 5 (1970).

Determination of Fairness

Case by case method of determination of fairness, etc. — A provision in a contract

for deferred payments, without a provision for security to the seller, does not necessarily make a contract inequitable, unjust, and unenforceable under this section. The particular circumstances of the case would determine whether such a contract is fair and just to both parties. *Chewning v. Brand*, 230 Ga. 255, 196 S.E.2d 399 (1973).

Equity will never decree specific performance of fraudulent, illegal, or hard and unconscionable bargain. *Swint v. Carr*, 76 Ga. 322, 2 Am. St. R. 44 (1886).

Contract upon which specific performance is sought must be certain, definite, and clear, and so precise in its terms that neither party can reasonably misunderstand it. *Estes v. Winn*, 136 Ga. 344, 71 S.E. 470 (1911); *Miller v. Watson*, 139 Ga. 29, 76 S.E. 585 (1912); *Treadwell v. Treadwell*, 216 Ga. 156, 115 S.E.2d 535 (1960).

Where the alleged contract sued on is based on an oral agreement to convey or devise land in consideration of the performance of ordinary personal services, the petition must not only show that the contract is precise in its terms, but must also allege the value of such service and the value of the land or specific data from which such relative values can be determined. *Treadwell v. Treadwell*, 216 Ga. 156, 115 S.E.2d 535 (1960).

Petition which did not give with precision the terms of contract for sale of land or its date, and which did not allege the extent and value of the services rendered or the value of the lands involved, which values must be set forth in order to show that the contract which it sought to enforce is one not unfair, unjust, or against good conscience, did not state a cause of action

for specific performance. *Johns v. Nix*, 196 Ga. 417, 26 S.E.2d 526 (1943); *Jenkins v. Evans*, 202 Ga. 423, 43 S.E.2d 501 (1947); *Howington v. Juhan*, 218 Ga. 748, 130 S.E.2d 822 (1963); *Walker v. Bush*, 234 Ga. 366, 210 S.E.2d 285 (1975); *Moody v. Mendenhall*, 238 Ga. 689, 234 S.E.2d 905 (1977).

In order for a suit for specific performance of a contract for the sale of land to prevail, the plaintiff must prove the value of the property so as to enable the court to determine that the contract was fair, just, and not against good conscience. *Morgan v. Mitchell*, 209 Ga. 348, 72 S.E.2d 310 (1952); *Jones v. Dallas*, 243 Ga. 124, 252 S.E.2d 603 (1979).

Where there was a lack of necessary and indispensable allegations as to adequacy of consideration, the petition failed to state a cause of action for specific performance of an option to sell property, the only relief sought; and the court should have sustained the defendants' general demurrer (now motion to dismiss) raising that question and dismissed the petition. *Alexander v. American Legion Post No. 28*, 209 Ga. 285, 71 S.E.2d 627 (1952).

Where a petition for specific performance of an alleged lease of lands, to be used by the lessee for an airfield does not allege any sum of money to be the fair, just, and equitable rental value of the lands, and the alleged lease provides that the lessor shall be paid 10 percent of the passenger traffic, and 5 percent for instructions, there is nothing upon which to base a decision that the contract is fair, just, and equitable, and in good conscience should be performed. *Harris v. Abney*, 208 Ga. 518, 67 S.E.2d 724 (1951).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Equity, §§ 25, 26. 71 Am. Jur. 2d, Specific Performance, § 5.

ALR. — Right of vendor to specific performance with abatement from purchase price where he is unable to perform as to part of property, 81 ALR 900.

Fraud or misrepresentation not sufficient to prevent or support other forms of relief as ground for refusing specific per-

formance of land contract, 87 ALR 1345.

Specific performance of contract or option as affected by unexecuted provision for determination of price by arbitrators or appraisers, 167 ALR 727.

Improvement of property after execution of contract or option as affecting right of purchaser or optionee to specific performance, 174 ALR 699.

Nature of deed which may be required of vendor who is unable to convey title for which he has contracted, 13 ALR2d 1462.

Necessity and sufficiency of allegation, in

a suit for specific performance of a contract for the sale of land, as to the adequacy of the consideration or as to the fairness of the contract, 100 ALR2d 551.

23-2-134. Vendor's ability to comply.

The vendor seeking specific performance shall show an ability to comply substantially with his contract in every part and as to all the property. However, a vendor's want of title or other inability as to part of the property shall not be a good answer to the vendee seeking performance who is willing to accept title to part of the property, receiving compensation for the other part. If the defects in the vendor's title are trifling or comparatively small, equity shall decree at his instance, granting compensation for such defects. (Orig. Code 1863, § 3123; Code 1868, § 3135; Code 1873, § 3191; Code 1882, § 3191; Civil Code 1895, § 4041; Civil Code 1910, § 4638; Code 1933, § 37-806.)

Law reviews. — For article discussing the historical background of the doctrine of tender and the application in Georgia of

tender requirements, and proposing reforms, see 21 Mercer L. Rev. 413 (1969).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

SUBSTANTIAL COMPLIANCE

SPECIFIC PERFORMANCE AND DAMAGES

General Consideration

Cited in Pearson v. Courson, 129 Ga. 656, 59 S.E. 907 (1907); Smith v. Davis, 168 Ga. 511, 148 S.E. 265 (1929); Loewus v. Eskridge & Downing, Inc., 175 Ga. 456, 165 S.E. 576 (1932); Ledbetter v. Goodroe, 179 Ga. 69, 175 S.E. 250 (1934); Lee v. Lee, 191 Ga. 728, 13 S.E.2d 774 (1941); Higdon v. Dixon, 203 Ga. 67, 45 S.E.2d 423 (1947); Lively v. Lively, 206 Ga. 606, 58 S.E.2d 168 (1950); Whiteway Neon-Ad, Inc. v. Maddox, 211 Ga. 27, 83 S.E.2d 676 (1954); Lawton v. Byck, 217 Ga. 676, 124 S.E.2d 369 (1962); West v. Downer, 218 Ga. 235, 127 S.E.2d 359 (1962); Byck v. Lawton, 218 Ga. 858, 131 S.E.2d 176 (1963).

Substantial Compliance

Party seeking specific performance of

contract must show substantial compliance with his part of agreement; otherwise he is not entitled to a decree. Christopher v. Whitmire, 199 Ga. 280, 34 S.E.2d 100 (1945).

Petition seeking specific performance of a parol contract to convey land was fatally defective because of its failure to show that the petitioner had performed her part of the agreement, namely, to marry the defendant and aid him in regaining his health and carrying on his business, since by virtue of the fact that her Mexican divorce was invalid, the attempted marriage between the parties was void. Christopher v. Whitmire, 199 Ga. 280, 34 S.E.2d 100 (1945).

Mere retention of possession by vendor, after time to perform contract, will not

defeat his petition. *Belle Greene Mining Co. v. Tuggle*, 65 Ga. 652 (1880).

However, he should show that he has merchantable title. *Lindsey v. Humbrecht*, 162 F. 438 (N.D. Ga. 1907).

Unless knowledge of extent of his interest was known to vendee. *Mims v. Jones*, 135 Ga. 541, 69 S.E. 824 (1910).

Specific Performance and Damages

Specific performance and damages are not inconsistent remedies and may be pursued in same action. *Warren v. Camp*, 232 Ga. 681, 208 S.E.2d 489 (1974).

Vendor has his election between specific performance and damages. *Warren v. Camp*, 232 Ga. 681, 208 S.E.2d 489 (1974).

Vendor has no right to force upon vendee something which he has not agreed to buy. The rule is different, however, when the application for specific performance comes from the vendee. There is a manifest reason for this difference. The vendee has a right, if he sees proper to do so, to accept less than he bargained for, and compensation for the loss of that which he does not obtain. *R.C. Cropper Co. v. Middle Ga. Broadcasting Co.*, 212 Ga. 235, 91 S.E.2d 605 (1956).

Right of vendee to partial performance and damages. — Where a valid contract has been made to devise certain lands to an-

other, and the person to whom the promise was made has fully performed his part of the contract, but the representative of the person making the promise is unable to perform the entire contract because his decedent did not own all of the property which he agreed to devise, and the other party to the contract is willing to accept that part of the same which the deceased actually owned, a court will require specific performance of the contract as to the part so owned and compensate the injured or disappointed party in damages for the other. *Bowles v. White*, 206 Ga. 433, 57 S.E.2d 547 (1950).

Where it is impossible for the vendor to convey all of the lands included in the contract of sale, a small portion having been conveyed to the highway department, and it being a contract which in good conscience ought to be performed, equity will decree performance and grant compensation for such land as cannot be conveyed, where the vendee has expressed a willingness to proceed according to the provisions of this section. *Chatham Amusement Co. v. Perry*, 216 Ga. 445, 117 S.E.2d 320 (1960).

In order to entitle one to recover damages in lieu of specific performance, complainant must prove his right to the latter remedy. *Warren v. Camp*, 232 Ga. 681, 208 S.E.2d 489 (1974).

RESEARCH REFERENCES

Am. Jur. 2d. — 71 Am. Jur. 2d, Specific Performance, §§ 68, 207.

C.J.S. — 81 C.J.S., Specific Performance, § 106.

ALR. — Right of party who has once refused to perform to have specific performance of contract, 2 ALR 416.

Obligation of assignee to vendor to perform contract on assignment by purchaser of contract to sell real property, 59 ALR 954.

Necessity of tender of performance by vendee as condition of specific performance where vendor's title is defective, 79 ALR 1240.

Right of vendor to specific performance with abatement from purchase price where he is unable to perform as to part of property, 81 ALR 900.

Sale by vendor of all or substantial part of property to a third person before time fixed for performance of contract of sale as breach, or ground of rescission by vendee, or as affecting rights to specific performance, 90 ALR 337.

Provision in land contract for pecuniary forfeiture or penalty by party in default as affecting the right of the other party to specific performance, 98 ALR 887.

Doctrine of part performance in suits for specific performance of parol contract to convey real property, 101 ALR 923.

Option to purchase at price offered to optionor by third person, 136 ALR 138.

Remedy of specific performance as available to vendee's assignee, 138 ALR 205.

Right of vendee to enforce specific per-

formance where his vendor holds equitable title under executory contract or deed in escrow executed by owner of legal title, 141 ALR 1432.

Purchaser's right to specific performance as to part only of property contracted for where title fails as to rest, 148 ALR 563.

Specific performance of land contract where vendor will be compelled to acquire, or incur expense in clearing, title, 171 ALR 1299.

Right of purchaser in making tender to deduct from agreed purchase price amount of obligations which it is the vendor's duty to satisfy, 173 ALR 1309.

Specific performance: compensation or damages awarded purchaser for delay in conveyance of land, 7 ALR2d 1204.

Specific performance of land contract notwithstanding failure of vendee to make required payments on time, 55 ALR3d 10.

23-2-135. Damages when specific performance impossible.

If, for any cause, specific performance is impossible or if the vendee declines to accept a performance in part, the court may proceed to assess damages for the breach of the contract. (Orig. Code 1863, § 3124; Code 1868, § 3136; Code 1873, § 3192; Code 1882, § 3192; Civil Code 1895, § 4042; Civil Code 1910, § 4639; Code 1933, § 37-807.)

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION DAMAGES GENERALLY

General Consideration

Cited in Woodall v. Williams, 176 Ga. 343, 167 S.E. 886 (1933); Deich v. Reeves, 203 Ga. 596, 48 S.E.2d 373 (1948); Bowles v. White, 206 Ga. 433, 57 S.E.2d 547 (1950); Douglas v. Langford, 206 Ga. 864, 59 S.E.2d 386 (1950); Harris v. Underwood, 208 Ga. 247, 66 S.E.2d 332 (1951); Holsomback v. Caldwell, 218 Ga. 393, 128 S.E.2d 47 (1962); Horner v. Savannah Valley Enterprises, Inc., 234 Ga. 371, 216 S.E.2d 113 (1975).

Damages Generally

Specific performance and damages may be pursued in same action. — If, on the trial of an action for specific performance, it should be developed that without fault of

the plaintiff but on account of the defendant himself a specific performance of the contract is impossible, the court may proceed to assess damages for a breach of the contract. An amendment praying for such damages would not in contemplation of law make a new cause of action, for this section expressly authorizes the granting of such relief, even when not contemplated by the original suit. *Armor v. Stubbs*, 150 Ga. 520, 104 S.E. 500 (1920); *Lewis v. Warren*, 51 Ga. App. 135, 179 S.E. 918 (1935).

In order to entitle one to recover damages in lieu of specific performance, complainant must prove his right to the latter remedy. *Prater v. Sears*, 77 Ga. 28 (1886); *Loewus v. Eskridge & Downing, Inc.*, 175 Ga. 456, 165 S.E. 576 (1932).

RESEARCH REFERENCES

Am. Jur. 2d. — 71 Am. Jur. 2d, Specific Performance, §§ 69-71.

C.J.S. — 81 C.J.S., Specific Performance, § 106.

ALR. — Dismissal of suit as affecting election of remedies as between damages and specific performance, 26 ALR 111.

Doctrine of part performance in suits for specific performance of parol contract to convey real property, 101 ALR 923.

Right of one seeking specific performance to recover as damages an amount measured by depreciation in value of property itself, or in its market price or value,

subsequent to defendant's default, 105 ALR 1421.

Specific performance: compensation or damages awarded purchaser for delay in conveyance of land, 7 ALR2d 1204.

Awarding damages for delay, in addition to specific performance, of contract for sale of corporate stock, 28 ALR3d 1401.

Decree allowing or denying specific performance of contract as precluding, as a matter of res judicata, subsequent action for money damages for breach, 38 ALR3d 323.

23-2-136. Specific personalty; damages or delivery.

Any good reason in equity and good conscience why the complainant should have the possession of specific personalty to which he has title shall sustain an action for specific performance or delivery and, unless rebutted by other equitable reasons, shall justify a decree. The jury in such cases may decree either damages or specific delivery. (Orig. Code 1863, § 3120; Code 1868, § 3132; Code 1873, § 3188; Code 1882, § 3188; Civil Code 1895, § 4038; Civil Code 1910, § 4635; Code 1933, § 37-803.)

JUDICIAL DECISIONS

As a general rule, remedy of decree for specific performance relates only to real estate, and is not applicable to personalty, so the cardinal rules which apply to the remedy of specific performance are applied with greater strictness where personalty is concerned than where realty is involved. *Gabrell v. Byers*, 178 Ga. 16, 172 S.E. 227 (1933).

But there are exceptions to this rule, and insolvency alone may supply basis for an exception. *Reid v. McRae*, 190 Ga. 323, 9 S.E.2d 176 (1940).

Where in a settlement between a landlord and a tenant the landlord credited the tenant with a sum for which the tenant agreed that he would turn over to the landlord a check for parity on cotton which he was to receive from the federal govern-

ment, and where on receipt of the check he failed and refused to endorse and deliver it to the landlord, the tenant being insolvent, the landlord could maintain an action for specific performance to require the tenant to endorse and deliver the check in accordance with the agreement, the petition stating a cause of action for specific performance, injunction, and receivership. *Reid v. McRae*, 190 Ga. 323, 9 S.E.2d 176 (1940).

In order to sustain a petition for the specific performance of a contract relating to personal property, it is necessary to allege some good reason in equity and good conscience to take the case out of the general rule. *Gabrell v. Byers*, 178 Ga. 16, 172 S.E. 227 (1933).

RESEARCH REFERENCES

Am. Jur. 2d. — 17 Am. Jur. 2d, Contracts, § 4.

ALR. — A provision in land contract for pecuniary forfeiture or penalty by a party is default as affecting the right of the other party to specific performance, 32 ALR 584; 98 ALR 887.

Specific performance of contract for sale of corporate stock, 130 ALR 920.

Specific performance, or injunction against breach, of contract for sale of tangible personal property, 152 ALR 4.

CHAPTER 3

EQUITABLE REMEDIES AND PROCEEDINGS GENERALLY

Article 1

General Provisions

- Sec.
 23-3-1. Legal and equitable rights given effect; legal and equitable remedies applied.
 23-3-2. How equitable relief claimed.
 23-3-3. Ancillary extraordinary remedies.
 23-3-4. Extraordinary remedies for defendant.

Article 2

Ne Exeat

- 23-3-20. Nature of ne exeat; when granted.
 23-3-21. Showing required.
 23-3-22. Verification necessary; bond and additional verification at judge's discretion.
 23-3-23. Defendant's bond; responsibility of officer taking insufficient security.
 23-3-24. Disposition of property.
 23-3-25. Issuance of writ without judge's sanction.

Article 3

Quia Timet

PART 1

CONVENTIONAL QUIA TIMET

- 23-3-40. Purpose of quia timet.
 23-3-41. When relief granted; costs.
 23-3-42. Cloud on title; what constitutes; when removable.

PART 2

QUIA TIMET AGAINST ALL THE WORLD

- Sec.
 23-3-60. Purpose of article.
 23-3-61. Who may bring proceeding.
 23-3-62. Venue; contents, verification and filing of petition; filing in lis pendens docket.
 23-3-63. Submission to special master.
 23-3-64. Other required evidence.
 23-3-65. Notice; process; service by publication; filing of adverse pleading; appointment of disinterested representative.
 23-3-66. Jurisdiction of special master; trial by jury.
 23-3-67. Decree; effect of recordation.
 23-3-68. Compensation of master and representative; taxing as part of costs.
 23-3-69. Intervention after entering of decree.
 23-3-70. Joinder.
 23-3-71. Liberal construction.
 23-3-72. Remedy cumulative.

Article 4

Equitable Interpleader

- 23-3-90. Interpleader; when compelled; taxing of costs, attorney's fees.
 23-3-91. Verification of petition.
 23-3-92. Collateral interpleader.

Article 5

Bills of Peace

- 23-3-110. Bill of peace; when entertained; ancillary injunction.

ARTICLE 1

GENERAL PROVISIONS

JUDICIAL DECISIONS

The purpose of this article is to vest in the superior court authority under the Uniform Procedure Act (now codified in this article and §§ 23-4-2 and 23-4-3) to

settle in one suit a controversy between parties. *Clay v. Smith*, 207 Ga. 610, 63 S.E.2d 602 (1951).

23-3-1. Legal and equitable rights given effect; legal and equitable remedies applied.

The superior courts, on the trial of any civil case, shall give effect to all the rights of the parties, legal, equitable, or both, and apply remedies or relief, legal, equitable, or both, in favor of either party, as the nature of the case may allow or require. (Ga. L. 1887, p. 64, § 1; Civil Code 1895, § 4833; Civil Code 1910, § 5406; Code 1933, § 37-901.)

Law reviews. — For article discussing third party beneficiary contracts, see 4 Ga. B.J. 19 (1941).

For comment on *McMillian v. Spencer*,

162 Ga. 659, 134 S.E. 921 (1926), see 1 Ga. L. Rev. 52 (1927). For comment on *Waters v. Waters*, 217 Ga. 557, 123 S.E.2d 765 (1962), see 25 Ga. B.J. 419 (1963).

JUDICIAL DECISIONS

Adequate remedy at law not ground for dismissal of petition with legal cause of action when filed in superior court. — A petition which sets forth a legal cause of action, though using terms appropriate to an equitable proceeding, insofar as the same does not seek any extraordinary relief, is not demurrable (now subject to motion to dismiss) on the ground that the plaintiff has an adequate remedy by bringing an action at law. *Arteaga v. Arteaga*, 169 Ga. 595, 151 S.E. 5 (1929); *Woodall v. Williams*, 176 Ga. 343, 167 S.E. 886 (1933); *Latham v. Fowler*, 192 Ga. 686, 16 S.E.2d 591 (1941); *Pardue Medicine Co. v. Pardue*, 194 Ga. 516, 22 S.E.2d 143 (1942); *Cohen v. Cohen*, 200 Ga. 33, 35 S.E.2d 908 (1945); *Parnell v. Wooten*, 202 Ga. 443, 43 S.E.2d 673 (1947); *Echols v. Thompson*, 210 Ga. 37, 77 S.E.2d 521 (1953).

This section changed the rule that a petition praying for only ordinary equitable relief is demurrable (now subject to motion to dismiss) on the ground that the plaintiff has a complete and adequate remedy at law. *Teasley v. Bradley*, 110 Ga. 497, 35 S.E. 782, 78 Am. St. R. 113 (1900);

Booth & Co. v. Mohr & Sons, 122 Ga. 333, 50 S.E. 173 (1905); *Georgia Peruvian Ochre Co. v. Cherokee Ochre Co.*, 152 Ga. 150, 108 S.E. 609 (1921); *Logue & Co. v. Gardner*, 152 Ga. 356, 110 S.E. 25 (1921); *Grimmett v. Barnwell*, 184 Ga. 461, 192 S.E. 191 (1937).

So petition not demurrable (now subject to motion to dismiss) on certain grounds.

— Since the passage of this section a petition which sets forth a legal cause of action, though using terms appropriate to an equitable proceeding, is not demurrable (now subject to motion to dismiss) on the grounds: (a) that it sets forth no cause of action; (b) that there is no equity in the petition; and (c) that the plaintiff has an adequate remedy at law. *Smith v. Hancock*, 163 Ga. 222, 136 S.E. 52 (1926).

Because legal and equitable cases may be joined in the same action. *Concrete Coring Contractors v. Mechanical Contractors & Eng'rs*, 220 Ga. 714, 141 S.E.2d 439 (1965).

Also, misjoinder of claims not ground for objection. — The joining against the same defendants of legal and equitable rights and remedies which are connected

with or dependent upon each other does not render a petition subject to the objection of duplicity or misjoinder of claims. *Center v. Arp*, 198 Ga. 574, 32 S.E.2d 308 (1944).

And despite statutory remedies at law, a superior court could settle the whole controversy to avoid a multiplicity of actions. *Haney v. Sheppard*, 207 Ga. 158, 60 S.E.2d 453 (1950).

Purpose of article. — This and kindred legislation (this article and §§ 23-4-2 and 23-4-3) was intended to afford a party the opportunity to have all his rights in regard to the subject matter tried in one action in the superior court, without the necessity of having two distinct actions to settle his legal rights and his equitable rights against the adverse party. Sometimes equitable pleadings by one of the parties may require the making of additional parties, in order that full relief may be granted. *Delaney v. Sheehan*, 138 Ga. 510, 75 S.E. 632 (1912); *Penn Mut. Life Ins. Co. v. Taggart*, 38 Ga. App. 509, 144 S.E. 400 (1928); *Cummings v. Robinson*, 194 Ga. 336, 21 S.E.2d 627 (1942); *Moore v. Robinson*, 206 Ga. 27, 55 S.E.2d 711 (1949); *Earney v. Owen*, 213 Ga. 412, 99 S.E.2d 201 (1957).

So, a plaintiff shall not be harassed by other actions growing out of the same controversy, although they are based upon independent claims, legal or equitable, which the defendant might have against the plaintiff in reference to the cause of the controversy. *McCall v. Fry*, 120 Ga. 661, 48 S.E. 200 (1904).

Section construed with § 23-3-2. — Referring to this section and to § 23-3-2, the Georgia Supreme Court said: "these Acts (this article and §§ 23-4-2 and 23-4-3) have been construed with the utmost liberality, to the end that all the remedies and relief to which the respective parties might be entitled should be applied and accorded in one action." *Douglas v. Jenkins*, 146 Ga. 341, 91 S.E. 49, 1918C Ann. Cas. 322 (1916); *Durden v. Youmans*, 37 Ga. App. 182, 139 S.E. 91 (1927); *Star Laundry Co. v. May Dry Cleaning Co.*, 176 Ga. 34, 166 S.E. 655 (1932); *Latham v. Fowler*, 192 Ga. 686, 16 S.E.2d 591 (1941).

Actions arising out of general plan between parties must be asserted in one action. — Where proceeding to enjoin an

action against plaintiff to cancel a sale of plaintiff's property by defendant as well as the note on which the defendant is suing arose out of same general plan between the parties to develop and operate a recreational place, defendant in action on note by answer and counterclaim must assert all his claims for legal and equitable relief arising out of the general plan between the parties, and could not bring an independent action to enjoin action on the note and litigate those matters. *Clay v. Smith*, 207 Ga. 610, 63 S.E.2d 602 (1951).

Where a trover action was filed in a superior court, and thereafter the defendant filed, in a different superior court, an equitable action, to enjoin the trover action, and for other relief, so far as the petition alleged any defense or cause of complaint against any of the parties named as defendants, the same could have been asserted as effectually by way of defense or counterclaim in the trover proceeding, and the allegations did not show any necessity for an independent equitable action. *Hamilton v. First Nat'l Bank*, 180 Ga. 820, 180 S.E. 840 (1935).

Effect of § 9-5-6 on proceedings under this article. — Although under this article a creditor may in one action proceed for judgment on his debt and to set aside a fraudulent conveyance made by his debtor, still, under § 9-5-6, creditors who have not reduced their demands to judgment, and who have no lien otherwise, cannot, as a general rule, enjoin their debtors from selling or disposing of their property. *Lawrence v. Lawrence*, 196 Ga. 204, 26 S.E.2d 283 (1943).

All distinction between legal and equitable remedies and relief and the modes of administering them are not abolished. Except in providing that both kinds shall be applied for by one form of petition, and may be administered by the court in one and the same proceeding, it leaves the mode of trial as to each unchanged. *Mackenzie v. Flannery & Co.*, 90 Ga. 590, 16 S.E. 710 (1892).

This section does not give to the superior courts an unlimited power to "give effect to all the rights of the parties, legal or equitable, or both," but the exercise of the power is restricted to instances when the nature of the case may allow or require it.

Rogers v. Rogers, 183 Ga. 131, 187 S.E. 633 (1936).

Collateral matters not within scope of original proceedings not encompassable by equitable jurisdiction. — While a court of equitable jurisdiction, when it has all the necessary parties before it and has once taken jurisdiction of a particular subject matter, will ordinarily proceed to do complete justice, and finally administer the rights of each of the respective parties, it will not extend its jurisdiction in such manner as to draw to itself collateral matters not appropriately comprehended within the scope of the original proceedings under which, in the first instance, it assumed jurisdiction. *Rogers v. Rogers*, 183 Ga. 131, 187 S.E. 633 (1936).

Lack of jurisdiction of nonresident party prevents superior court from taking jurisdiction. — A separate and distinct equitable cause of action against the resident defendant will not give the superior court of the county of his residence jurisdiction of a nonresident defendant against whom the plaintiff has another, independent, separate and distinct equitable cause of action; this is especially true where the plaintiff has an adequate remedy at law on his cause of action against the nonresident defendant. *Shaheen v. Dunaway Drug Stores, Inc.*, 246 Ga. 790, 273 S.E.2d 158 (1980).

Application of legal and equitable principles. — When both legal and equitable principles are united in one petition, the court applies legal principles to legal rights and equitable principles to equitable rights. *Thomas v. Walker*, 115 Ga. 11, 41 S.E. 269 (1902); *Bentley v. Crummey & Hamilton*, 119 Ga. 911, 47 S.E. 209 (1904).

The difference is one of substance, and not of form, and this was the practice of the courts in this state even prior to the passage of the Uniform Procedure Act of 1887 (now Art. 1 of this chapter and §§ 23-4-2 and 23-4-3). *Baker & Hall v. Gladden*, 72 Ga. 469 (1884); *Crawford v. Williams*, 76 Ga. 792 (1886); *Berrie v. Smith*, 97 Ga. 782, 25 S.E. 757 (1896).

Showing prerequisites to maintenance of petition. — Since the passage of the Uniform Procedure Act of 1887 (now this article, §§ 23-4-2 and 23-4-3), it is not necessary, in order to maintain the petition,

that the plaintiff should make it appear that it has no remedy at law. *DeLacy v. Hurst, Purnell & Co.*, 83 Ga. 223, 9 S.E. 1052 (1889); *Georgia Iron & Coal Co. v. Etowah Iron Co.*, 104 Ga. 395, 30 S.E. 878 (1898); *Ray v. Home & Foreign Inv. & Agency Co.*, 106 Ga. 492, 32 S.E. 603 (1899); *Teasley v. Bradley*, 110 Ga. 497, 35 S.E. 782, 78 Am. St. R. 113 (1900); *Brooks v. Stroud*, 111 Ga. 875, 36 S.E. 960 (1900); *Evans v. Piedmont Nat'l Bldg. & Loan Ass'n*, 117 Ga. 940, 44 S.E. 2 (1903).

The nature of the relief prayed for is immaterial. *Troup v. Martin*, 158 Ga. 178, 122 S.E. 611 (1924).

But the superior court has no more power or jurisdiction by the combination of courts of law and equity, than those two courts had before the Uniform Procedure Act of 1887 (now this article, §§ 23-4-2 and 23-4-3). *Broomhead v. Grant*, 83 Ga. 451, 10 S.E. 116 (1889).

Therefore this section does not purport to create rights otherwise unauthorized or prohibited. *Penn Life Ins. Co. v. Taggart*, 38 Ga. App. 509, 144 S.E. 400 (1928).

Grounds for extraordinary relief unchanged. — Since this article and §§ 23-4-2 and 23-4-3, permitting parties to obtain all necessary and proper legal and equitable relief in the same case, did not create any new ground for extraordinary remedies, the settled general rule still obtains that the remedy of injunction does not lie in favor of one who has a complete and adequate remedy at law, such as an ordinary attachment. *Virginia-Carolina Chem. Co. v. Provident Sav. Life Assurance Soc'y*, 126 Ga. 50, 54 S.E. 929 (1906); *Campbell v. Deal*, 185 Ga. 474, 195 S.E. 432 (1938); *Lawrence v. Lawrence*, 196 Ga. 204, 26 S.E.2d 283 (1943).

The aid of the superior court may be invoked to protect an equitable interest necessary to an action to recover damages. *Lowery Lock Co. v. Wright*, 154 Ga. 867, 115 S.E. 801 (1923).

The right of equitable set-off may be granted in the superior courts, but not city courts which cannot grant affirmative equitable relief. *Hecht v. Snook & Austin Furn. Co.*, 114 Ga. 921, 41 S.E. 74 (1902).

Enjoining nuisances. — A court of equitable jurisdiction, having jurisdiction to enforce the common right of all of the

plaintiffs to enjoin an alleged nuisance, will seek to do complete justice by granting them all appropriate relief, whether legal or equitable. *Knox v. Reese*, 149 Ga. 379, 100 S.E. 371 (1919).

Enjoining counterclaim proper. — The plaintiff, by bringing the action for divorce in the Superior Court of Fulton County, had submitted himself to the jurisdiction of the court even though he did not live in the state. The relief sought in the counterclaim that action be enjoined because plaintiff was not a citizen and was not of the state was pertinent and could be rightfully urged against the plaintiff and it was not necessary that he be served with the counterclaim. *Callaway v. Jones & Quattlebum*, 19 Ga. 277 (1856); *Markham v. Huff*, 72 Ga. 874 (1884); *Caswell v. Bunch*, 77 Ga. 504 (1886); *Moore, Marsh & Co. v. Medlock*, 101 Ga. 94, 28 S.E. 836 (1897); *Ray v. Home & Foreign Inv. & Agency Co.*, 106 Ga. 492, 32 S.E. 603 (1849); *Home Mixture Guano Co. v. Woolfolk*, 148 Ga. 567, 97 S.E. 637 (1918); *Shorter v. Shorter*, 150 Ga. 109, 102 S.E. 863 (1920).

Article 3, Ch. 2, T. 22 makes adequate provision for anyone claiming an interest in the subject property to assert equitable as well as legal rights to the property in the condemnation proceeding itself. *Mitchell v. State Hwy. Dep't*, 216 Ga. 517, 118 S.E.2d 88 (1961).

An action for land may be included in a petition for equitable relief. *Latham v. Fowler*, 192 Ga. 686, 16 S.E.2d 591 (1941).

Partition, accounting, settlement of title, in same suit. — A tenant in common may have certain land so held partitioned and an accounting between the tenants in common under § 44-6-160. The court has power to determine the various matters in dispute between the parties, including their respective title to the land, to have an accounting for rents and profits, award partition, etc. *Griffin v. Griffin*, 153 Ga. 547, 113 S.E. 161 (1922).

Petition for accounting maintainable even though proof for injunctive relief not shown. — A petition for an injunction and an accounting, alleging that the defendant had excluded the petitioner from the management of his business and had acquired and failed to account for considerable moneys derived from its profits, while

failing to allege any fraud or insolvency of the defendant, and thus not showing any ground for injunctive relief, sufficiently stated a cause of action for an accounting. *Cohen v. Cohen*, 200 Ga. 33, 35 S.E.2d 908 (1945).

Also, where a plaintiff seeks by way of accounting to recover an amount alleged to be due him upon a contract, and to that extent may have prima facie an adequate remedy at law, and it also appears from the allegations of the petition that his action for damages is not an adequate remedy, or that his legal remedy will be nugatory without the cooperation of equity, the aid of a court of equity may be invoked. *Alexis, Inc. v. Werbell*, 209 Ga. 665, 75 S.E.2d 168 (1953).

And, while the general rule is that, for a plaintiff to maintain an equitable petition to remove a cloud upon his title, he must allege and prove possession in himself, nevertheless since it is competent for the plaintiff to obtain both legal and equitable relief in the same action where a plaintiff seeks to have the title to land declared to be in herself, in addition to cancellation and injunction, the fact that the plaintiff fails to show possession in herself does not prevent her from having the title to the property adjudged to be in her, although such fact would defeat the cancellation sought. *Moody v. McHan*, 184 Ga. 740, 193 S.E. 240 (1937).

Reformation of deed, recovery of possession, and damages maintainable in one action. — The owner of land who has to have reformation of one or more deeds in his title chain before he can recover, by ejectment or other legal remedy, the possession of land held adversely to him may bring an action in superior court to reform the deed and in the same action pray for recovery of the possession of the land and for damages for its detention. *Mims v. Lifsey*, 192 Ga. 366, 15 S.E.2d 440 (1941).

Heirs' suit against administrator. — Heirs at law may sue an administrator and his sureties upon his bond, and may, by way of amendment to the action, pray for an accounting and settlement with the administrator. *DeLacy v. Hurst, Purnell & Co.*, 83 Ga. 223, 9 S.E. 1052 (1889); *Williams v. Lancaster*, 113 Ga. 1020, 39 S.E. 471 (1901).

A demurrer (now motion to dismiss) to a prayer for injunction against a levy on property should be sustained where the invalidity of the levy could be set up in a claim case. *Atlanta Mut. Ass'n v. Swift & Co.*, 153 Ga. 722, 113 S.E. 8 (1922).

The foreclosure of mortgages permissible in equity, can be accomplished in a court of law. *Block v. Allen*, 99 Ga. 417, 27 S.E. 733 (1896).

Manner of setting up equitable defenses at law. — *Littleton v. Spell*, 77 Ga. 227, 2 S.E. 935 (1886).

Different judgments against different parties. — Where an equitable defense is set up by the defendant in an action of ejectment and prevails against the right of any one or more of the plaintiffs to recover, the common-law rule as to actions of ejectment, that all the plaintiffs shall recover or none, does not apply. *Rumph v. Truelove*, 66 Ga. 480 (1881); *Milner v. Vandivere*, 86 Ga. 540, 12 S.E. 879 (1891).

An amendment in a claim case may bring in new parties. The fraudulent nature of the claimant's deed may be set up. *Ford v. Holloway*, 112 Ga. 851, 38 S.E. 373 (1901).

Hence, a court may allow recovery of a debt in a petition to cancel a deed. *Lanier v. Elder*, 154 Ga. 707, 115 S.E. 81 (1922); *Harper v. Atlanta Milling Co.*, 203 Ga. 608, 48 S.E.2d 89 (1948).

Where proceeding to enjoin an action against plaintiff to cancel a sale of plaintiff's property by defendant as well as the note on which the defendant is suing arose out of same general plan between the parties to develop and operate a recreational place, defendant in action on note by answer and counterclaim must assert all his claims for legal and equitable relief arising out of the general plan between the parties, and could not bring an independent action to enjoin action on the note and litigate those matters. *Clay v. Smith*, 207 Ga. 610, 63 S.E.2d 602 (1951).

An ancillary petition may be filed after as well as before a decree to enable a superior court to effectuate its own decree by ordering one put in possession of property where entitled thereto under its original decree, in order to avoid the further litigation of questions once settled between the same parties. *Voyles v. Federal Land Bank*, 182 Ga. 569, 186 S.E. 405 (1936).

Fraudulent release. — An amendment setting up that a release pleaded in defense to an action for personal injuries was fraudulent, and should be set aside is permissible. *Western & A.R.R. v. Atkins*, 141 Ga. 743, 82 S.E. 139 (1914).

An amendment to a petition to enforce promissory notes may set up that defendant was adjudged a bankrupt and pray for special judgment against exempted property. *Wright v. Horne*, 123 Ga. 86, 51 S.E. 30 (1905).

A defendant in ejectment may set up an equitable defense to an action at law. *Clewis v. Hartman*, 71 Ga. 810 (1883); *Woffard v. Wyly*, 72 Ga. 863 (1884).

Action at law against trust estates. — A petition at law, with proper allegation, may suffice to enforce any kind of a just demand against a trust estate. *Miller v. Smythe*, 92 Ga. 154, 18 S.E. 46 (1893).

Affirmative relief. — The defendant may obtain affirmative relief by an answer in an action for specific performance, cancellation, injunction and damages to land. *Becker v. Donaldson*, 133 Ga. 864, 67 S.E. 92 (1910).

When dismissal of answer not authorized. — By striking from a petition that portion making a defendant who has prayed for affirmative relief, a party thereto, will not authorize a dismissal of the answer. *Troup v. Martin*, 158 Ga. 178, 122 S.E. 611 (1924).

Effect of failure to make equitable defense at law. — A party who has an equitable defense must make it or he will be concluded by the judgment. *Field v. Price*, 52 Ga. 469 (1874); *Thomason v. Fannin*, 54 Ga. 361 (1975); *Turner v. Rives*, 75 Ga. 606 (1885); *McCall v. Fry*, 120 Ga. 661, 48 S.E. 200 (1904).

But it has been held that the defendant is not obligated to do so, if he prefers, he may file his petition. *Elder v. Allison*, 45 Ga. 13 (1872).

However, there is authority suggesting that the defendant had better set up all defenses he has or stand barred. *Thomason v. Fannin*, 54 Ga. 361 (1875).

Upon an application for an interlocutory injunction, the superior court is without jurisdiction to enter a decree finally fixing the amount of money to be paid by either of the parties to the

other. *Leary v. First Nat'l Bank*, 177 Ga. 179, 170 S.E. 84 (1933).

Counter-claim not affected by dismissal of original claim. — Dismissal of an action for want of prosecution, where the defendant has filed a cross-claim (now counter-claim) seeking equitable relief, does not dismiss the issues raised by the cross-claim; this is true where the relief sought affects codefendants in the proceeding. *Winn v. Armour & Co.*, 184 Ga. 769, 193 S.E. 447 (1937); *Byrd v. Equitable Life Assurance Soc'y*, 185 Ga. 628, 196 S.E. 63 (1938).

Cited in *Cox v. Cox*, 48 Ga. 619 (1873); *Manheim v. Claflin & Co.*, 81 Ga. 129, 7 S.E. 284 (1889); *De Lacy v. Hurst, Purnell & Co.*, 83 Ga. 223, 9 S.E. 1052 (1889); *Regenstein v. Tyler & Co.*, 84 Ga. 277, 10 S.E. 719 (1890); *Stapler v. Hardeman*, 91 Ga. 127, 16 S.E. 657 (1893); *Georgia Iron & Coal Co. v. Etowah Iron Co.*, 104 Ga. 395, 30 S.E. 878 (1898); *Brumby v. Harris*, 107 Ga. 257, 33 S.E. 49 (1899); *Ford v. Holloway*, 112 Ga. 851, 38 S.E. 373 (1901); *Hecht v. Snook & Austin Furn. Co.*, 114 Ga. 921, 41 S.E. 74 (1902); *Perkins v. Castleberry*, 119 Ga. 702, 46 S.E. 825 (1904); *Carstarphen Whse. Co. v. Fried*, 124 Ga. 544, 52 S.E. 598 (1905); *Douglas v. Jenkins*, 146 Ga. 341, 91 S.E. 49, 1918C Ann. Cas. 322 (1916); *Real Estate Bank & Trust Co. v. Baldwin Locomotive Works*, 148 Ga. 821, 98 S.E. 486 (1919); *Beacham v. Nobles*, 153 Ga. 718, 113 S.E. 6 (1922); *Hopkins v. Vance*, 153 Ga. 754, 113 S.E. 157 (1922); *McMillian v. Spencer*, 162 Ga. 569, 134 S.E. 921 (1926); *Ocilla Grocery Co. v. Wilcox, Ives & Co.*, 37 Ga. App. 718,

141 S.E. 822 (1928); *White v. First Nat'l Bank*, 174 Ga. 281, 162 S.E. 701 (1932); *Burgess v. Ohio Nat'l Life Ins. Co.*, 177 Ga. 48, 169 S.E. 364 (1933); *Reynolds v. Ingraham*, 179 Ga. 398, 175 S.E. 918 (1934); *Biddle v. Papa*, 180 Ga. 468, 179 S.E. 357 (1935); *Tanner v. Wilson*, 183 Ga. App. 53, 187 S.E. 625 (1936); *Harrell v. Parker*, 186 Ga. 760, 198 S.E. 776 (1938); *Hicks v. Atlanta Trust Co.*, 187 Ga. 314, 200 S.E. 301 (1938); *Mize v. Harber*, 189 Ga. 737, 8 S.E.2d 1 (1940); *Lynch v. Harris County*, 191 Ga. 132, 12 S.E.2d 293 (1940); *Sawyer Coal & Ice Co. v. Kinnett-Odom Co.*, 192 Ga. 166, 14 S.E.2d 879 (1941); *Lockwood v. Daniel*, 193 Ga. 122, 17 S.E.2d 542 (1941); *Beavers v. Mabry*, 195 Ga. 169, 23 S.E.2d 672 (1942); *Borum v. Deese*, 196 Ga. 292, 26 S.E.2d 538 (1943); *Clark v. Bandy*, 196 Ga. 546, 27 S.E.2d 17 (1943); *Alford v. Alford*, 198 Ga. 424, 31 S.E.2d 785 (1944); *Beavers v. Williams*, 199 Ga. 114, 33 S.E.2d 343 (1945); *Avary v. Avary*, 202 Ga. 22, 41 S.E.2d 314 (1947); *Hamilton v. Hamilton*, 80 Ga. App. 750, 57 S.E.2d 301 (1950); *Georgia Power Co. v. Mayor of Athens*, 206 Ga. 513, 57 S.E.2d 573 (1950); *Cashin v. Markwaller*, 208 Ga. 444, 67 S.E.2d 226 (1951); *Rockefeller v. First Nat'l Bank*, 213 Ga. 493, 100 S.E.2d 279 (1957); *Waters v. Waters*, 217 Ga. 557, 123 S.E.2d 765 (1962); *Ogletree v. Cathrall*, 110 Ga. App. 100, 137 S.E.2d 799 (1964); *Brown v. Granite Holding Corp.*, 221 Ga. 560, 146 S.E.2d 289 (1965); *Jonesboro Area Athletic Ass'n v. Dickson*, 227 Ga. 513, 181 S.E.2d 852 (1971); *Kiser v. Georgia Power Co.*, 126 Ga. App. 551, 191 S.E.2d 311 (1972).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Equity, § 178.

C.J.S. — 30 C.J.S., Equity, § 97 et seq.

ALR. — Joinder of parties or causes of action in suits under the Federal Employers' Liability Act, 13 ALR 159.

A provision in land contract for pecuniary forfeiture or penalty by a party is default as affecting the right of the other party to specific performance, 32 ALR 584; 98 ALR 877.

Power of equity to require acceptance of damages in lieu of injunctive relief asked, 105 ALR 1381.

Power of equity to decree that party perform obligations of contract within fixed time upon pain of forfeiture, 114 ALR 1389.

Power of court to determine de jure title to office as incident of suit to protect possession of officer against claimant whose title is disputed, 114 ALR 1147.

Jurisdiction of equity to protect personal rights; modern view, 175 ALR 438.

Applications of rule permitting courts to exercise jurisdiction over equity actions against foreign personal representatives where there are assets within forum, 53 ALR2d 323.

Right to reformation of contract or instrument as affected by intervening rights of third persons, 79 ALR2d 1180.

Injunction against exercise of power of eminent domain, 93 ALR2d 465.

23-3-2. How equitable relief claimed.

Any person may, in any civil action, claim equitable relief by appropriate and sufficient pleadings and obtain the equitable relief proper in the case. (Ga. L. 1884-85, p. 36, § 1; Civil Code 1895, § 4834; Civil Code 1910, § 5407; Code 1933, § 37-902.)

Law reviews. — For comment on *McMillian v. Spencer*, 162 Ga. 659, 134 S.E. 921 (1926), see 1 Ga. L. Rev. 52 (1927).

JUDICIAL DECISIONS

All legal and equitable defenses must be set up in one action. — This article and §§ 23-4-2 and 23-4-3 have been construed by the Supreme Court of Georgia with the utmost liberality, and the manifest intention of the General Assembly that all the remedies and relief to which the respective parties in any civil cause might be entitled should be applied and accorded in one action, has been given full effect. *Star Laundry Co. v. May Dry Cleaning Co.*, 176 Ga. 34, 166 S.E. 655 (1932); *Johnson v. Fulton County* 216 Ga. 498, 117 S.E.2d 155 (1960).

And action arising out of general plan between parties must be asserted in one action. — Where proceeding to enjoin an action against plaintiff to cancel a sale of plaintiff's property by defendant as well as the note on which the defendant is suing arose out of same general plan between the parties to develop and operate a recreational place, defendant in action on note by answer and counterclaim must assert all his claims for legal and equitable relief arising out of the general plan between the parties, and could not bring an independent action to enjoin action on the note and litigate those matters. *Clay v. Smith*, 207 Ga. 610, 63 S.E.2d 602 (1951).

An ancillary petition may be filed after as well as before a decree to enable a supe-

rior court to effectuate its own decree by ordering one put in possession of property where entitled thereto under its original decree, in order to avoid the further litigation of questions once settled between the same parties. *Voyles v. Federal Land Bank*, 182 Ga. 569, 186 S.E. 405 (1936).

After an ancillary petition seeking possession of property is filed, the court may cause other parties to be made, where they are asserting some rights affecting the property and while a claimant in possession may not be subject to summary dispossession by the sheriff under the warrant sued out, the superior court has authority, under its broad powers, to make the claimant a party in order to settle the rights of all parties in one action, without remitting the petitioner in the ancillary proceeding to a common-law action of ejectment. *Voyles v. Federal Land Bank*, 182 Ga. 569, 186 S.E. 405 (1936).

Injunction pending trover action. — An injunction to restrain interference with defendant's possession pending action in trover might have been obtained by a plea to the trover action. *Mallory Bros & Co. v. Cowart*, 90 Ga. 600, 16 S.E. 658 (1892).

Obtaining relief in claim action. — In a claim case, in the absence of a suitable amendment of proper equitable pleas, the plaintiff in fi. fa. cannot introduce evidence

which tends to show merely that in good conscience and equity the claimant is liable for a debt. *Gormerly v. Chapman*, 51 Ga. 421 (1874); *Hamberger v. Easter*, 57 Ga. 71 (1876); *Southern Mining Co. v. Brown*, 107 Ga. 264 33 S.E. 73 (1899); *Ford v. Holloway*, 112 Ga. 851, 38 S.E. 373 (1901); *Liberty Lumber Co. v. Enecks*, 23 Ga. App. 311, 98 S.E. 97 (1919).

Amendment seeking equitable relief in common law action allowed. *Moon v. First Nat'l Bank*, 163 Ga. 489, 136 S.E. 433 (1927).

Cited in *Douglas v. Jenkins*, 146 Ga. 341, 91 S.E. 49, 1918C Ann. Cas. 322 (1916);

McMillian v. Spencer, 162 Ga. 659, 134 S.E. 921 (1926); *Burgess v. Ohio Nat'l Life Ins. Co.*, 177 Ga. 48, 169 S.E. 364 (1933); *Leary v. First Nat'l Bank*, 177 Ga. 179, 170 S.E. 84 (1933); *Reynolds v. Ingraham*, 179 Ga. 398, 175 S.E. 918 (1934); *Biddle v. Papa*, 180 Ga. 468, 179 S.E. 357 (1935); *Hicks v. Atlanta Trust Co.*, 187 Ga. 314, 200 S.E. 301 (1938); *Davis v. Wright*, 194 Ga. 1, 21 S.E.2d 88 (1942); *Clements v. Hollingsworth*, 202 Ga. 684, 44 S.E.2d 381 (1947); *Seckinger v. Citizens & S. Nat'l Bank*, 213 Ga. 586, 100 S.E.2d 587 (1957); *A & D Barrel & Drum Co. v. Fuqua*, 132 Ga. App. 827, 132 S.E.2d 272 (1974).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Equity, §§ 182, 188-192.

C.J.S. — 30 C.J.S., Equity, §§ 171 et seq., 179 et seq.

ALR. — Joinder of parties or causes of action in suits under the Federal Employers' Liability Act, 13 ALR 159.

Right under general prayer to relief

inconsistent with prayer for specific relief, 30 ALR 1175.

"Rightness" of judgment as open for consideration in suit in equity to complete or effectuate it, 139 ALR 1507.

Measure and items of recovery for improvements mistakenly placed or made on land of another, 24 ALR2d 11.

23-3-3. Ancillary extraordinary remedies.

A person who asserts a claim for equitable relief may at any time, by proper pleading and proof, also apply for and obtain any of the extraordinary remedies available from the court in its exercise of equitable powers. (Ga. L. 1884-85, p. 36, § 1; Civil Code 1895, § 4836; Civil Code 1910, § 5409; Code 1933, § 37-904.)

JUDICIAL DECISIONS

This section does not permit the courts to grant relief under prayers for extraordinary remedies, where there is adequate remedy at law. *Teasley v. Bradley*, 110 Ga. 497, 35 S.E. 782, 78 Am. St. R. 113 (1900). See also, *Kilpatrick v. Coates*, 154 Ga. 643, 115 S.E. 103 (1922).

History and purpose. — This section, other sections of this article, and §§ 23-4-2 and 23-4-3 were codified from the Uniform Procedure Acts of 1884 and 1887, vest authority in the superior courts of this state to settle in one proceeding all issues growing out of a justiciable controversy be-

tween the same parties; and, under these rules of procedure, it is clear that the plaintiffs can in a pending processioning proceeding, by proper pleading and proof, obtain all of the relief sought in an independent action. *Earney v. Owne*, 213 Ga. 412, 99 S.E.2d 201 (1957).

Cited in *Liberty Lumber Co. v. Enecks*, 23 Ga. App. 311, 98 S.E. 97 (1919); *Kilpatrick v. Coates*, 154 Ga. 643, 115 S.E. 103 (1922); *Biddle v. Papa*, 180 Ga. 468, 179 S.E. 357 (1935); *Hoxie v. Americus Auto. Co.*, 73 Ga. App. 686, 37 S.E.2d 808 (1946); *Georgia Power Co. v. Mayor of*

Athens, 206 Ga. 513, 57 S.E.2d 573 (1950); Seckinger v. Citizens & S. Nat'l Bank, 213 Ga. 586, 100 S.E.2d 587 (1957); Ogletree v.

Cathrall, 110 Ga. App. 100, 137 S.E.2d 799 (1964).

RESEARCH REFERENCES

ALR. — Joinder of parties or causes of action in suits under the Federal Employers' Liability Act, 13 ALR 159.

Power of equity in absence of statute to render deficiency judgment in foreclosure action, 34 ALR 1015.

Reformation as condition of assertion of

right of action or defense predicated on the true contract differing from that evidenced by the written instrument; and right to both reformation and other relief in same action or suit, 66 ALR 763.

Remedy and procedure to avoid release or satisfaction of judgment, 9 ALR2d 553.

23-3-4. Extraordinary remedies for defendant.

Any defendant may, by proper pleadings and sufficient evidence, obtain the benefit of extraordinary remedies allowed in equitable proceedings by the superior court. (Ga. L. 1884-85, p. 36, § 2; Civil Code 1895, § 4838; Civil Code 1910, § 5411; Code 1933, § 37-906.)

JUDICIAL DECISIONS

The purpose of this section is to vest in the superior court authority under this article and §§ 23-4-2 and 23-4-3 to settle in one suit a controversy between parties. *Clay v. Smith*, 207 Ga. 610, 63 S.E.2d 602 (1951).

Action arising out of general plan between parties must be asserted in one action. — Where proceeding to enjoin an action against plaintiff to cancel a sale of plaintiff's property by defendant as well as the note on which the defendant is suing arose out of same general plan between the parties to develop and operate a recreational place, defendant in action on note by answer and counterclaim must assert all his claims for legal and equitable relief arising out of the general plan between the parties, and could not bring an independent action to enjoin action on the note and litigate those matters. *Clay v. Smith*, 207 Ga. 610, 63 S.E.2d 602 (1951).

Where a trover action was filed in a superior court, and thereafter the defendant filed, in a different superior court, an equitable action, to enjoin the trover action, and for other relief, so far as the petition alleged any defense or cause of complaint

against any of the parties named as defendants, the same could have been asserted as effectually by way of defense or counterclaim in the trover proceeding, and the allegations did not show any necessity for an independent equitable action. *Hamilton v. First Nat'l Bank*, 180 Ga. 820, 180 S.E. 840 (1935).

After an ancillary petition seeking possession of property is filed, the court may cause other parties to be made, where they are asserting some rights affecting the property and while a claimant in possession may not be subject to summary dispossession by the sheriff under the warrant sued out, the superior court has authority, under its broad powers, to make the claimant a party in order to settle the rights of all parties in one action, without remitting the petitioner in the ancillary proceeding to a common-law action of ejectment. *Voyles v. Federal Land Bank*, 182 Ga. 569, 186 S.E. 405 (1936).

Ancillary issues triable in dispossessory proceeding. — While § 9-13-175 forbids a sheriff to put a purchaser in possession of land sold by him, when another person is in possession and has held it adversely to the

defendant in fi. fa. from a time before the judgment against such defendant, the purchaser, when brought into equity by the party in possession, may, by answer and counterclaim, make such issues as to fraudulent and collusive title as necessarily would arise in an action of ejectment between the same parties. *Voyles v. Federal Land Bank*, 182 Ga. 569, 186 S.E. 405 (1936).

An ancillary petition may be filed after as well as before a decree to enable a superior court to effectuate its own decree by ordering one put in possession of property where entitled thereto under its original decree, in order to avoid the further

litigation of questions once settled between the same parties. *Voyles v. Federal Land Bank*, 182 Ga. 569, 186 S.E. 405 (1936).

Cited in *McCall v. Fry*, 120 Ga. 661, 48 S.E. 200 (1904); *McMillian v. Spencer*, 162 Ga. 659, 134 S.E. 921 (1926); *O'Leary v. Costello*, 169 Ga. 754, 151 S.E. 487 (1930); *Tanner v. Wilson*, 183 Ga. App. 53, 187 S.E. 625 (1936); *Hicks v. Atlanta Trust Co.*, 187 Ga. 314, 200 S.E. 301 (1938); *Hoxie v. Americus Auto. Co.*, 73 Ga. App. 686, 37 S.E.2d 808 (1946); *Georgia Power Co. v. Mayor of Athens*, 206 Ga. 513, 57 S.E.2d 573 (1950).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Equity, §§ 19, 194-210.

ALR. — Power of equity in absence of

statute to render deficiency judgment in foreclosure action, 34 ALR 1015.

ARTICLE 2
NE EXEAT

Cross references. — As to attachment, see Ch. 3, T. 18.

23-3-20. Nature of ne exeat; when granted.

The writ of ne exeat shall issue to restrain a person from leaving the jurisdiction of the state. The writ may be granted in the following cases:

- (1) In favor of an obligor, promisor, or partner, against his co-obligor, joint promisor, or copartner equally or partly responsible with him for any duty to be performed;
- (2) Against persons illegally removing the property of a decedent or of a minor, at the instance of any person interested therein, or of a next friend of the minor;
- (3) At the instance of a remainderman or reversioner against anyone attempting to remove the property in which the remainder or reversion exists or may contingently exist;
- (4) At the instance of a mortgagee against a person holding the equity of redemption;
- (5) At the instance of any person interested legally or equitably in property about to be removed, where no adequate remedy is afforded

at law. (Laws 1814, Cobb's 1851 Digest, p. 526; Code 1863, § 3147; Code 1868, § 3159; Code 1873, § 3226; Code 1882, § 3226; Civil Code 1895, § 4886; Civil Code 1910, § 5459; Code 1933, § 37-1401.)

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

APPLICATION OF SECTION

CONDITIONS WHICH RENDER WRIT CANCELLED OR ILLEGAL

PLEADING AND PRACTICE

1. IN GENERAL
2. SERVICE OF WRIT
3. BREACH OF WRIT

General Consideration

History generally. — See *McGee v. McGee*, 8 Ga. 295, 52 Am. Dec. 407 (1850), and *Lamar v. Lamar*, 123 Ga. 827, 51 S.E. 763, 107 Am. St. R. 169, 3 Ann. Cas. 294 (1905).

Compliance with conditions of bond generally. — A ne exeat bond, as provided for by this section, is one for the personal appearance of the defendant at court; and the conditions of the bond are complied with when the principal is present at court, or within its jurisdiction and subject to its process. *August v. August*, 65 Ga. App. 883, 16 S.E.2d 784 (1941).

Cited in *May v. May*, 146 Ga. 521, 91 S.E. 687 (1917); *Shaw v. Jordan*, 178 Ga. 733, 174 S.E. 350 (1934); *Roberts v. Roberts*, 190 Ga. 649, 10 S.E.2d 62 (1940); *Hutton v. Hutton*, 243 Ga. 263, 254 S.E.2d 380 (1979).

Application of Section

This section contemplates action only in advance of a final judgment and there is no reference to any right to the issuance of writ after a final judgment had been obtained. *Lomax v. Lomax*, 176 Ga. 605, 168 S.E. 863 (1933).

This section is not directed to the enforcement of a judgment against one who has removed the property, etc., but is evidently directed to restrain future removal. *Lomax v. Lomax*, 176 Ga. 605, 168 S.E. 863 (1933).

Plainly, this section is not to enforce an adjudication in which it has been adjudged that the duty must be performed. *Lomax v. Lomax*, 176 Ga. 605, 168 S.E. 863 (1933).

The petition, under this section, must state that the defendant is removing or about to remove, either the property or himself, from the state. *Reed v. Barber*, 110 Ga. 524, 35 S.E. 650 (1900).

Sometimes the writ of ne exeat is issued only to restrain a person from leaving the jurisdiction of the state; sometimes it is issued against a person who is removing, or attempting to remove, property beyond the jurisdiction. *August v. August*, 65 Ga. App. 883, 16 S.E.2d 784 (1941).

Writ may issue pending application for alimony. — The writ of ne exeat may be granted in this state at the instance of a wife against her husband pending an application for alimony, and prior to any decree therefor. *Lamar v. Lamar*, 123 Ga. 827, 51 S.E. 763 (1905); *Pepper v. Pepper*, 169 Ga. 832, 152 S.E. 103 (1930).

This section does not refer to a mortgagee who has foreclosed, since the right is given only against a person holding the equity of redemption. *Lomax v. Lomax*, 176 Ga. 605, 168 S.E. 863 (1933).

The writ will issue against an attorney who has collected and refused to pay over money belonging to a client. *Conyers v. Gray*, 67 Ga. 329 (1881).

Conditions Which Render Writ Cancelled or Illegal

If the condition of a bail bond is more onerous than to compel the appearance of the principal defendant, it is illegal and void. *August v. August*, 65 Ga. App. 883, 16 S.E.2d 784 (1941).

Where a writ required the taking of a bond, not only for the personal appearance of the defendant, but for the payment of the judgment in the suit for alimony, the writ was void. *August v. August*, 65 Ga. App. 883, 16 S.E.2d 784 (1941).

If the application for the issuance of the writ of ne exeat is made in connection with an application for alimony, and no removal of property is involved, but merely an intended leaving of the state by the defendant, the judge ought not to require a bond conditioned both that the defendant will not remove beyond the jurisdictional limits of the state, and also that he will pay any judgment that may be found against him in favor of the plaintiff. This would not only require the husband to give security that he would remain in the jurisdiction, but also that he would be solvent and pay the money judgment. *August v. August*, 65 Ga. App. 883, 16 S.E.2d 784 (1941).

Where the provisions of the bond so vary from those prescribed by this section so as to increase the risk of the securities the bond is not binding on them. *August v. August*, 65 Ga. App. 883, 16 S.E.2d 784 (1941).

Writ of ne exeat issues to restrain a person from leaving the jurisdiction of the state; and where principal in a ne exeat

bond appears and defends suit against him for divorce and alimony, and is within the jurisdiction of the court when the final judgment is rendered against him, subject to processes of the court, such writ becomes functus officio, and upon motion the court should declare the bond cancelled and the sureties therein discharged. *May v. May*, 146 Ga. 521, 91 S.E. 687 (1917); *Lomax v. Lomax*, 176 Ga. 605, 168 S.E. 863 (1933).

Pleading and Practice

1. In General

Ne exeat, not injunction, is the proper remedy to restrain a purchasing partner from leaving the state without paying debts assumed by him. *Bleyer v. Blum & Co.*, 70 Ga. 558 (1883); *Tucker v. Murphey*, 114 Ga. 662, 40 S.E. 836 (1902).

2. Service of Writ

By reason of its very nature, service of a writ of ne exeat is not required. *Chlupacek v. Reed*, 225 Ga. 512, 169 S.E.2d 782 (1969).

3. Breach of Writ

Summary proceeding upon breach of writ. — Upon the breach of a ne exeat bond given in an action for alimony, the court may force payment of the bond from the surety in a summary proceeding, on an order to show cause why judgment should not be rendered on the bond. *Moore v. Edmondson*, 184 Ga. 818, 193 S.E. 780 (1937).

RESEARCH REFERENCES

C.J.S. — 30 C.J.S., Equity, § 77. 65 C.J.S., Ne Exeat, § 1 et seq.

ALR. — Power to issue writ of ne exeat to prevent decree for alimony from becoming ineffective, 8 ALR 327.

Rights and remedies against mortgagee under deed intended as a mortgage, who defeats or impairs equity of redemption by conveying or encumbering property, 46 ALR 1089.

23-3-21. Showing required.

In every case of application for a writ of ne exeat, the complaining party shall show that no adequate remedy is afforded at law, and that the defendant is removing or about to remove himself, his property, or the

specific property to which the complainant claims title or an interest. (Orig. Code 1863, § 3148; Code 1868, § 3160; Code 1873, § 3227; Code 1882, § 3227; Civil Code 1895, § 4887; Civil Code 1910, § 5460; Code 1933, § 37-1402.)

JUDICIAL DECISIONS

A statutory bond must follow closely the statute, and if the provisions of the bond so vary from those prescribed by the statute as to increase the risk of the securities the bond is not binding on them. *August v. August*, 65 Ga. App. 883, 16 S.E.2d 784 (1941).

If the application for the issuance of the writ of ne exeat is made in connection with an application for alimony, and no removal of property is involved, but merely an intended leaving of the state by the defendant, the judge ought not to require a bond conditioned both that the defendant will not remove beyond the jurisdictional limits of the state, and also that he will pay any judgment that may be found against him in favor of the plaintiff. This would not only require the husband to give security that he would remain in the jurisdiction, but also that he would be solvent and pay the money judgment. *August v. August*, 65 Ga. App. 883, 16 S.E.2d 784 (1941).

Issuance of writ generally. — Sometimes the writ of ne exeat is issued only to restrain a person from leaving the jurisdiction of the state; sometimes it is issued against a person who is removing, or attempting to remove, property beyond the jurisdiction. *August v. August*, 65 Ga. App.

883, 16 S.E.2d 784 (1941).

Danger of loss will be inferred from the fact alone that the defendant resides out of the state. *McGehee v. Polk*, 24 Ga. 406 (1858).

Declarations by the defendant that he intended to leave, followed by an answer that he did not then intend to leave, will not prevent the issuance of the writ. *Conyers v. Gray*, 67 Ga. 329 (1881).

But the writ issues only when the party cannot be held to bail at law. *Hannahan v. Nichols*, 17 Ga. 77 (1855).

And it will be dissolved where there is other appropriate relief. *Hawthorn v. Kelly*, 30 Ga. 965 (1860).

A ne exeat bond, as provided for by this section, is one for the personal appearance of the defendant at court; and the conditions of the bond are complied with when the principal is present at court, or within its jurisdiction and subject to its process. *August v. August*, 65 Ga. App. 883, 16 S.E.2d 784 (1941).

If the condition of a bail bond is more onerous than to compel the appearance of the principal defendant, it is illegal and void. *August v. August*, 65 Ga. App. 883, 16 S.E.2d 784 (1941).

RESEARCH REFERENCES

Am. Jur. 2d. — 6 Am. Jur. 2d, Attachment and Garnishment, § 4.

C.J.S. — 30 C.J.S., Equity, § 77. 65 C.J.S., Ne Exeat, § 8.

23-3-22. Verification necessary; bond and additional verification at judge's discretion.

(a) In every application for a writ of ne exeat, the petition or motion must be verified by one or more of the complainants.

(b) The judge may, in his discretion, require the complainant to give bond and security for the payment of any damages which the defendant may recover from him for obtaining the writ, before granting an order for the issuing of the same, and may require a verification by all or any of the complainants. (Ga. L. 1855-56, p. 219, § 4; Ga. L. 1857, p. 109, § 1; Code 1863, § 3151; Code 1868, § 3163; Code 1873, § 3230; Code 1882, § 3230; Civil Code 1895, § 4890; Civil Code 1910, § 5463; Code 1933, § 37-1405.)

JUDICIAL DECISIONS

Verification generally. — Resort must be had to the charges in the petition to decide whether the facts are sufficient to entitle the complainants to the writ. *McGehee v. Polk*, 24 Ga. 406 (1858).

Verification by agent. — An agent may verify the application, for writ of ne exeat, provided he states the facts as positively

and distinctly as is required of the complainant himself. But this does not deprive the court of the power to require the verification to be by the complainant in person. *Orme v. McPherson*, 36 Ga. 571 (1867). See also *Old Hickory Distilling Co. v. Bleyer*, 74 Ga. 201 (1884).

RESEARCH REFERENCES

Am. Jur. 2d. — 6 Am. Jur. 2d, Attachment and Garnishment, §§ 254-275, 518-522.
C.J.S. — 30 C.J.S., Equity, § 77.

23-3-23. Defendant's bond; responsibility of officer taking insufficient security.

The defendant may relieve himself, his property, or the specific property from the restraint imposed by giving bond in double the value of plaintiff's claim, with good security, to the officer serving the process, for the forthcoming of each or either, according to the tenor of the writ, to answer to complainant's claim or abide by the order and decree of the court. The judge granting the writ may, in his discretion, require a larger bond. An officer receiving insufficient security shall be held surety himself, and the sureties on his bond may be held responsible therefor. (Laws 1830, Cobb's 1851 Digest, p. 527; Code 1863, § 3149; Code 1868, § 3161; Code 1873, § 3228; Code 1882, § 3228; Civil Code 1895, § 4888; Civil Code 1910, § 5461; Code 1933, § 37-1403.)

JUDICIAL DECISIONS

The question of whether a writ of ne exeat can issue ex parte cannot be raised by a demurrer (now motion to dismiss) to a petition in an action on the bond. *Goldstein*

v. Jackson, 97 Ga. App. 28, 101 S.E.2d 869 (1958).

The writ of ne exeat must be issued prior to a final judgment. The writ is not

available to enforce a judgment which has already been obtained. The rule of the common law, whereby the writ of ne exeat issued only after judgment, is not of force in this state, since the common law as to this point has been superseded by this section. *Matthews v. Matthews*, 177 Ga. 412, 170 S.E. 250 (1933).

A ne exeat bond, as provided for by this section, is one for the personal appearance of the defendant at court; and the conditions of the bond are complied with when the principal is present at court, or within its jurisdiction and subject to its process. *August v. August*, 65 Ga. App. 883, 16 S.E.2d 784 (1941).

Court's order determines conditions of bond. — The requirements of this section as to what condition or conditions must be given in a ne exeat bond are dependent upon the requirements of the court's order, upon which the writ is issued. *Goldstein v. Jackson*, 97 Ga. App. 28, 101 S.E.2d 869 (1958).

Where the court's order only requires an appearance to respond, the principal is required only to give a bond to meet that requirement. The inclusion of more conditions in the bond than required in the order does not render the bond void, and the principal and surety will be bound only by the condition contained in the bond which was required by the court's order. *Goldstein v. Jackson*, 97 Ga. App. 28, 101 S.E.2d 869 (1958).

A statutory bond must follow closely the statute, and if the provisions of the bond so vary from those prescribed by the statute as to increase the risk of the securities the bond is not binding on them. *August v. August*, 65 Ga. App. 883, 16 S.E.2d 784 (1941).

Where the application for the issuance of the writ of ne exeat is made in connection with an application for alimony, and no removal of property is involved, but merely an intended leaving of the state by the defendant, the judge ought not to require a bond conditioned both that the defendant will not remove beyond the jurisdictional limits of the state, and also that he will pay any judgment that may be found against him in favor of the plaintiff. This would not only require the husband to give security that he would remain in the jurisdiction, but also that he would be solvent and pay the money judgment. *McGee v. McGee*, 8 Ga. 295, 52 Am. Dec. 407 (1850); *Pounds v. Pounds*, 136 Ga. 196, 71 S.E. 137 (1911); *August v. August*, 65 Ga. App. 883, 16 S.E.2d 784 (1941).

Cited in *Bleyer v. Blum & Co.*, 70 Ga. 558 (1883); *Pepper v. Pepper*, 169 Ga. 832, 152 S.E. 103 (1930); *Jordan v. Sexton*, 42 Ga. App. 218, 155 S.E. 356 (1930); *Lomax v. Lomax*, 176 Ga. 605, 168 S.E. 863 (1933); *Shaw v. Jordan*, 178 Ga. 733, 174 S.E. 350 (1934); *Hornsby v. Rodriguez*, 116 Ga. App. 234, 156 S.E.2d 830 (1967).

RESEARCH REFERENCES

Am. Jur. 2d. — 6 Am. Jur. 2d, Attachment and Garnishment, §§ 523-526.

C.J.S. — 30 C.J.S., Equity, § 77. 65 C.J.S., Ne Exeat, § 13.

23-3-24. Disposition of property.

If the defendant fails or refuses to replevy the property, the court may, in its discretion, make such disposition of it as shall appear most advantageous to all parties. (Orig. Code 1863, § 3150; Code 1868, § 3162; Code 1873, § 3229; Code 1882, § 3229; Civil Code 1895, § 4889; Civil Code 1910, § 5462; Code 1933, § 37-1404.)

JUDICIAL DECISIONS

Cited in *Bleyer v. Blum & Co.*, 70 Ga. 558 (1883); *Stephens v. Carter*, 215 Ga. 355, 110 S.E.2d 762 (1959).

RESEARCH REFERENCES

Am. Jur. 2d. — 6 Am. Jur. 2d, Attachment and Garnishment, § 510.

C.J.S. — 30 C.J.S., Equity, § 77. 65 C.J.S., Ne Exeat, §§ 1, 9, 10.

23-3-25. Issuance of writ without judge's sanction.

In cases of emergency, upon the affidavit of the complainant that he cannot obtain the sanction of the judge in time to remedy the mischief, the writ of ne exeat may issue at once, to continue until the first term of the court to which it is returnable, unless earlier heard by order of the judge. (Orig. Code 1863, § 3152; Code 1868, § 3164; Code 1873, § 3231; Code 1882, § 3231; Civil Code 1895, § 4891; Civil Code 1910, § 5464; Code 1933, § 37-1406.)

ARTICLE 3
QUIA TIMET

Cross references. — As to recordation and registration of deeds and other instruments generally, see Ch. 2, T. 44.

PART 1
CONVENTIONAL QUIA TIMET

23-3-40. Purpose of quia timet.

The proceeding quia timet is sustained in equity for the purpose of causing to be delivered and canceled any instrument which has answered the object of its creation or any forged or other iniquitous deed or other writing which, though not enforced at the time, either casts a cloud over the complainant's title or otherwise subjects him to future liability or present annoyance, and the cancellation of which is necessary to his perfect protection. (Orig. Code 1863, § 3153; Code 1868, § 3165; Code 1873, § 3232; Code 1882, § 3232; Civil Code 1895, § 4892; Civil Code 1910, § 5465; Code 1933, § 37-1407.)

Law reviews. — For article discussing the problems associated with acquiring good title, see 15 Ga. B.J. 281 (1953).

JUDICIAL DECISIONS

A plaintiff in an action to quiet title must assert that he holds some current record title or current prescriptive title, and not only an expectancy, in order to maintain his suit. *Gilmore v. Hunt*, 137 Ga. 272, 73 S.E. 364 (1910); *In re Rivermist Homeowners Ass'n*, 244 Ga. 515, 260 S.E.2d 897 (1979).

The petition must contain a request for cancellation of an instrument, otherwise it is defective and, thus, subject to motion to dismiss. *Tucker v. Ezell*, 148 Ga. 47, 95 S.E. 672 (1918).

And the petition should contain not mere conclusions but statements of fact showing that claimant is the true owner. *Weyman v. City of Atlanta*, 122 Ga. 539, 50 S.E. 492 (1905).

The principle upon which equity will lend its aid to remove a cloud upon title is that one in the rightful possession of property is entitled to the full, quiet, and peaceful enjoyment of the same, without present annoyance and harassment, or threatened molestation. *Duffee v. Jones*, 208 Ga. 639, 68 S.E.2d 699 (1952).

Allegations in petition, seeking a cancellation of a deed as a cloud upon the plaintiffs' title to an undivided two-sevenths' interest in the land, were not sufficient to constitute a cause of action as a proceeding quia timet under this section, where the petition did not allege that the deed purported to convey a complete title to a full interest in the tract. *Clark v. Woody*, 197 Ga. 683, 30 S.E.2d 181 (1944).

Although it is the general rule that, in order for a plaintiff to maintain an equitable petition to remove a cloud upon his title, he must allege and prove possession in himself, where there is any other distinct head of equity jurisdiction sufficient to support the action, possession of the plaintiff is

not required. *Sweat v. Arline*, 186 Ga. 460, 197 S.E. 893 (1938); *Moore v. Moore*, 188 Ga. 303, 4 S.E.2d 18 (1939).

Where plaintiff seeks specific performance of an oral contract for the devise of property of which he is in possession but which is owned by his aunt, and alleges that distress warrants for rent have been taken against him by her, it is shown that his interest in the property is put in jeopardy by the deed. *Harp v. Bacon*, 222 Ga. 478, 150 S.E.2d 655 (1966).

A court of equity has jurisdiction to cancel an execution illegally issued, and this is especially true where there is nothing in the record showing or tending to show that the execution sought to be canceled had been levied on any of the plaintiffs' property when the litigation was instituted. *Lenett v. Lutz*, 215 Ga. 369, 110 S.E.2d 628 (1959).

Recovery of rents and profits. — In a suit to recover and cancel the deeds of the defendant as clouds on the plaintiff's title, the plaintiff, if entitled to recover the land, may also recover the rents and profits while possession of the land was wrongfully withheld by the defendant. *Marshall v. Pierce*, 136 Ga. 543, 71 S.E. 893 (1911).

Cited in *Thompson v. Etowah Iron Co.*, 91 Ga. 538, 17 S.E. 663 (1893); *Felder v. Paulk*, 165 Ga. 135, 139 S.E. 873 (1927); *Simpson v. Ray*, 180 Ga. 395, 178 S.E. 726 (1935); *Land Dev. Corp. v. Union Trust Co.*, 180 Ga. 785, 180 S.E. 836 (1935); *Allen v. Bemis*, 193 Ga. 556, 19 S.E.2d 516 (1942); *Stow v. Hargrove*, 203 Ga. 735, 48 S.E.2d 454 (1948); *McDaniel v. Bagby*, 204 Ga. 750, 51 S.E.2d 805 (1949); *Todd v. Conner*, 220 Ga. 173, 137 S.E.2d 614 (1964); *Giddings v. Starks*, 242 Ga. 457, 249 S.E.2d 203 (1978).

RESEARCH REFERENCES

Am. Jur. 2d. — 65 Am. Jur. 2d, Quieting Title and Determination of Adverse Claims, §§ 2, 16, 63.

C.J.S. — 30 C.J.S., Equity, § 40.

ALR. — Doctrine of after-acquired title as between one who took before and one who took after common grantor or mortgagor acquired title, 25 ALR 83.

Right of vendor in contract for sale or exchange of real property to bring suit for

forfeiture, foreclosure, or rescission, or to quiet title or recover possession, without first giving notice, or making demand for possession, 94 ALR 1239.

Joinder of claims to separate parcels in suit to quiet or to remove cloud on title, or to determine adverse claims to land, 118 ALR 1400.

Common source of title doctrine, 5 ALR3d 375.

23-3-41. When relief granted; costs.

(a) In all proceedings quia timet or proceedings to remove clouds upon titles to real estate, if a proper case is made, the relief sought shall be granted to any complainant irrespective of whether the invalidity of the instrument sought to be canceled appears upon the face of the instrument or whether the invalidity appears or arises solely from facts outside of the instrument.

(b) In such cases the costs shall be taxed against the litigants in the discretion of the court. (Ga. L. 1905, p. 102, §§ 1, 2; Civil Code 1910, §§ 5466, 5467; Code 1933, §§ 37-1408, 37-1409.)

Law reviews. — For article discussing the problems with acquiring good title, see 15 Ga. B.J. 281 (1953).

JUDICIAL DECISIONS

Cited in Gainesville v. Dean, 124 Ga. 750, 53 S.E. 183 (1906); Land Dev. Corp. v. Union Trust Co., 180 Ga. 785, 180 S.E. 836 (1935); Hale v. Turner, 183 Ga. 593, 189

S.E. 10 (1936); Allen v. Bemis, 193 Ga. 556, 19 S.E.2d 516 (1942); Todd v. Conner, 220 Ga. 173, 137 S.E.2d 614 (1964); Harp v. Bacon, 222 Ga. 478, 150 S.E.2d 655 (1966).

RESEARCH REFERENCES

Am. Jur. 2d. — 65 Am. Jur. 2d, Quieting Title and Determination of Adverse Claims, §§ 2, 16, 63.

C.J.S. — 30 C.J.S., Equity, § 40.

ALR. — Use of property by public as affecting acquisition of title by adverse possession, 56 ALR3d 1182.

23-3-42. Cloud on title; what constitutes; when removable.

An instrument which, by itself or in connection with proof of possession by a former occupant or other extrinsic facts, gives the claimant thereunder an apparent right in or to the property may constitute a cloud on the title of the true owner; and the latter may proceed to have the same removed upon proof:

(1) That he cannot immediately or effectually maintain or protect his rights by any other course of proceeding open to him;

(2) That the instrument sought to be canceled is such as would operate to throw a cloud or suspicion upon his title and might be vexatiously or injuriously used against him;

(3) That he either suffers some present injury by reason of the hostile claim of right or, though the claim has not been asserted adversely or aggressively, he has reason to apprehend that the evidence upon which he relies to impeach or invalidate the same as a claim upon his title may be lost or impaired by lapse of time. (Civil Code 1895, § 4893; Civil Code 1910, § 5468; Code 1933, § 37-1410.)

Law reviews. — For article discussing the problems with acquiring good title, see 15 Ga. B.J. 281 (1953).

JUDICIAL DECISIONS**ANALYSIS****GENERAL CONSIDERATION
REMOVAL OF CLOUD GENERALLY****General Consideration**

History generally. — This section is derived from the decision in *Thompson v. Etowah Iron Co.*, 91 Ga. 538, 17 S.E. 663 (1893).

“Cloud upon title” defined. — In order for an outstanding conveyance to be a cloud upon title, it is necessary that it of itself, or in connection with alleged extrinsic facts, should constitute an apparent title; that is, one upon which a recovery could or might be had against the true owner were he in possession and relying upon possession alone. Anything which would force him to attack the adverse title, or to exhibit his own, would be a cloud; anything which would not have this effect,

would be no cloud. An instrument which springs from no definite source whatsoever, for example, from a stranger to the title, can never properly be considered a cloud. *Thompson v. Etowah Iron Co.*, 91 Ga. 538, 17 S.E. 663 (1893); *McMullen v. Cooper*, 125 Ga. 435, 54 S.E. 97 (1906).

The following instruments have been canceled as clouds in: *Israel v. Wolf*, 100 Ga. 339, 28 S.E. 109 (1897); *Adams v. Johnson*, 129 Ga. 611, 59 S.E. 269 (1907) (will of property not owned by testator, but not before probate); *Denham v. Walker*, 93 Ga. 497, 21 S.E. 102 (1893) (deed with condition subsequent after condition broken); *Fulgham v. Pate*, 77 Ga. 454 (1886) (void sale of property by wife to hus-

band); *Brewton v. Smith*, 28 Ga. 442 (1859) (void deed); *Wynne v. Lumpkin*, 35 Ga. 208 (1866) (illegal deed); *Walker v. Hunter*, 27 Ga. 336 (1859) (deed without consideration); *Graham v. Hall*, 68 Ga. 354 (1882) (deed based upon illegal judgment); *Butler v. Durham*, 2 Ga. 413 (1847) (deed *functus officio*); *Smith v. Burrus*, 139 Ga. 10, 76 S.E. 362 (1912) (forged deed).

Cited in *Morris v. Mobley*, 171 Ga. 224, 155 S.E. 8 (1930); *Hadaway v. Hadaway*, 192 Ga. 265, 14 S.E.2d 874 (1941); *Fairview Terrace, Inc. v. Roberts*, 215 Ga. 407, 110 S.E.2d 641 (1959); *Collins v. Storer Broadcasting Co.*, 217 Ga. 41, 120 S.E.2d 764 (1961); *Drake v. Barrs*, 225 Ga. 597, 170 S.E.2d 684 (1969).

Removal of Cloud Generally

Removal of cloud requires proof of possession. — The general rule is that, in order for a plaintiff to maintain an equitable petition to remove a cloud upon his title, he must allege and prove actual possession in himself, for the reason that where the defendant is in possession, the plaintiff has a remedy to test his title at law by bringing an action in ejectment, which is

ordinarily deemed an adequate remedy, and there is no ground for the exercise of equitable jurisdiction. *Hale v. Turner*, 183 Ga. 593, 189 S.E. 10 (1936).

Except where there is any other distinct head of equity jurisdiction sufficient to support the action, possession by the plaintiff is not required, but equity will retain the cause and grant relief by quieting the title or removing clouds. *Hale v. Turner*, 183 Ga. 593, 189 S.E. 10 (1936); *Sweat v. Arline*, 186 Ga. 460, 197 S.E. 893 (1938).

A senior unrecorded deed loses its priority over a junior recorded deed for value from the same vendor, taken without knowledge or notice of the existence of the senior deed, and in a proper case may be canceled at the instance of the grantee in such junior recorded deed. *Terry v. Ellis*, 189 Ga. 698, 7 S.E.2d 282 (1940).

Or where land is wild and unoccupied, or at least not in the actual possession of the defendant, the plaintiff need not be in possession in order to maintain suit to quiet title or remove cloud therefrom. *Hale v. Turner*, 183 Ga. 593, 189 S.E. 10 (1936).

RESEARCH REFERENCES

Am. Jur. 2d. — 65 Am. Jur. 2d, Quietening Title and Determination of Adverse Claims, §§ 2, 16, 63.

C.J.S. — 30 C.J.S., Equity, §§ 29, 39, 57.

ALR. — Doctrine of after-acquired title as between one who took before and one who took after common grantor or mortgagor acquired title, 25 ALR 83.

Return of payments as condition of cancellation of land contract as cloud on title, 35 ALR 274.

Right of one not in possession to maintain suit to remove cloud on title in case of fraud, 36 ALR 698.

What constitutes cloud on title removable in equity, 78 ALR 24.

Right of vendor in contract for sale or

exchange of real property to bring suit for forfeiture, foreclosure, or rescission, or to quiet title or recover possession, without first giving notice, or making demand for possession, 94 ALR 1239.

Remedies of grantor who has conveyed with covenants against third person asserting title or interest hostile to covenants, 97 ALR 711.

Marketability of title derived from or through, or affected by possible claim of, infant, 24 ALR2d 1306.

Maintainability, by lessee, of action to quiet title to leasehold, 51 ALR2d 1227.

Use of property by public as affecting acquisition of title by adverse possession, 56 ALR3d 1182.

PART 2

QUIA TIMET AGAINST ALL THE WORLD

23-3-60. Purpose of part.

The purpose of this part is to create a procedure for removing any cloud upon the title to land, including the equity of redemption by owners of land sold at tax sales, and for readily and conclusively establishing that certain named persons are the owners of all the interests in land defined by a decree entered in such proceeding, so that there shall be no occasion for land in this state to be unmarketable because of any uncertainty as to the owner of every interest therein. (Ga. L. 1966, p. 443, § 11.)

JUDICIAL DECISIONS

Cited in *Capers v. Camp*, 244 Ga. 7, 257 S.E.2d 517 (1979); *In re Rivermist Homeowners Ass'n*, 244 Ga. 515, 260 S.E.2d 897 (1979).

RESEARCH REFERENCES

ALR. — Tax deed and recitals therein as evidence of regularity of tax proceedings as to advertising and notice of sale, and as to time, manner, and place of sale, 30 ALR 8; 88 ALR 264.

23-3-61. Who may bring proceeding.

Any person, which term shall include a corporation, partnership, or other association, who claims an estate of freehold present or future or any estate for years of which at least five years are unexpired, including persons holding lands under tax deeds, in any land in this state, whether in the actual and peaceable possession thereof or not and whether the land is vacant or not, may bring a proceeding in rem against all the world to establish his title to the land and to determine all adverse claims thereto or to remove any particular cloud or clouds upon his title to the land, including an equity of redemption, which proceeding may be against all persons known or unknown who claim or might claim adversely to him, whether or not the petition discloses any known or possible claimants. (Ga. L. 1966, p. 443, § 1.)

JUDICIAL DECISIONS

Legislative intent. — This section creates an efficient, speedy, and effective means of adjudicating disputed title claims and was intended by the General Assembly to serve as an additional remedy to other legal and equitable actions. *Heath v. Stinson*, 238 Ga. 364, 233 S.E.2d 178 (1977).

A plaintiff in an action to quiet title must assert that he holds some current record title or current prescriptive title, and not only an expectancy, in order to maintain his suit. *In re Rivermist Homeowners Ass'n*, 244 Ga. 515, 260 S.E.2d 897 (1979).

Plaintiff in the action to quiet title failed to bring itself within the language of this section where it showed no current claim to an estate of freehold nor an estate of years. *In re Rivermist Homeowners Ass'n*, 244 Ga. 515, 260 S.E.2d 897 (1979).

Cited in *Pittard v. McMillon*, 225 Ga. 239, 167 S.E.2d 644 (1969); *McGee v.*

Craig, 230 Ga. 553, 198 S.E.2d 165 (1973); *Gauker v. Eubanks*, 230 Ga. 893, 199 S.E.2d 771 (1973); *James v. Gainey*, 231 Ga. 543, 203 S.E.2d 163 (1974); *Rockmart Bank v. Dister*, 233 Ga. 748, 213 S.E.2d 645 (1975); *Williams v. Mathis*, 237 Ga. 305, 227 S.E.2d 378 (1976); *Burruss v. Bailey*, 238 Ga. 72, 230 S.E.2d 878 (1976); *Selby v. Gilmer*, 240 Ga. 241, 240 S.E.2d 80 (1977); *Peacock v. Nat'l Bank & Trust Co.*, 241 Ga. 280, 244 S.E.2d 816 (1978); *Ferguson v. Golf Course Consultants, Inc.*, 243 Ga. 112, 252 S.E.2d 907 (1979); *Capers v. Camp*, 244 Ga. 7, 257 S.E.2d 517 (1979); *Thompson v. Cheatham*, 244 Ga. 117, 259 S.E.2d 62 (1979); *Wiggins v. Southern Bell Tel. & Tel. Co.*, 245 Ga. 526, 266 S.E.2d 148 (1980); *Flaum v. Middlebury, Inc.*, 246 Ga. 682, 272 S.E.2d 695 (1980); *Cole v. Thrasher*, 246 Ga. 683, 272 S.E.2d 696 (1980); *Cooley v. All The World*, 247 Ga. 459, 276 S.E.2d 615 (1981).

RESEARCH REFERENCES

Am. Jur. 2d. — 1 Am. Jur. 2d, Actions, § 41. 65 Am. Jur. 2d, Quieting Title and Determination of Adverse Claims, § 6.

C.J.S. — 30 C.J.S., Equity, § 102.

ALR. — Doctrine of after-acquired title as between one who took before and one who took after common grantor or mortgagor acquired title, 25 ALR 83.

Tax deed and recitals therein as evidence of regularity of tax proceedings as to advertising and notice of sale, and as to time, manner, and place of sale, 30 ALR 8; 88 ALR 264.

Return of payments as condition of cancellation of land contract as cloud on title, 35 ALR 274.

Right of one not in possession to maintain suit to remove cloud on title in case of fraud, 36 ALR 698.

Judgment (or final order) affecting title or interest in real property as subject to collateral attack because of insufficiency of description in the pleadings, 111 ALR 1200.

Suit to determine ownership, or protect rights, in respect of instruments not physically within the state but relating to real estate therein as one in rem or quasi in rem, jurisdiction of which may rest upon constructive service, 161 ALR 1073.

Constitutionality of a statute which, regardless of possession by the owner, reduces title to real estate to a mere right of action to be asserted within a prescribed period of time, 7 ALR2d 1366.

Marketability of title derived from or through, or affected by possible claim of, infant, 24 ALR2d 1306.

Maintainability, by lessee, of action to quiet title to leasehold, 51 ALR2d 1227.

Common source of title doctrine, 5 ALR3d 375.

Use of property by public as affecting acquisition of title by adverse possession, 56 ALR3d 1182.

23-3-62. Venue; contents, verification and filing of petition; filing in lis pendens docket.

(a) The proceeding in rem shall be instituted by filing a petition in the superior court of the county in which the land is situated.

(b) The petition shall be verified by the petitioner and shall contain a particular description of the land to be involved in the proceeding, a specification of the petitioner's interest in the land, a statement as to whether the interest is based upon a written instrument (whether same be a contract, deed, will, or otherwise) or adverse possession or both, a description of all adverse claims of which petitioner has actual or constructive notice, the names and addresses, so far as known to the petitioner, of any possible adverse claimant, and, if the proceeding is brought to remove a particular cloud or clouds, a statement as to the grounds upon which it is sought to remove the cloud or clouds.

(c) With the petition there shall be filed (1) a plat of survey of the land, (2) a copy of the immediate instrument or instruments, if any, upon which the petitioner's interest is based, and (3) a copy of the immediate instrument or instruments of record or otherwise known to the petitioner, if any, upon which any person might base an interest in the land adverse to the petitioner.

(d) Upon the filing of the petition, the petitioner shall contemporaneously file with the clerk of the court a notice for record in the lis pendens docket pursuant to Code Sections 44-14-610 through 44-14-613. (Ga. L. 1966, p. 443, § 2.)

Law reviews. — For note discussing problems with venue in Georgia, and proposing statutory revisions to improve

the resolution of venue questions, see 9 Ga. St. B.J. 254 (1972).

JUDICIAL DECISIONS

Cited in Selby v. Gilmer, 240 Ga. 241, 240 S.E.2d 80 (1977); Middleton v. Robinson, 241 Ga. 174, 244 S.E.2d 7 (1978); Capers v. Camp, 244 Ga. 7, 257

S.E.2d 517 (1979); In re Rivermist Homeowners Ass'n, 244 Ga. 515, 260 S.E.2d 897 (1979).

RESEARCH REFERENCES

ALR. — Statute requiring filing of formal notice of lis pendens in certain classes of cases as affecting common-law doctrine of lis pendens in other cases, 10 ALR 306.

Right of one not in possession to

maintain suit to remove cloud on title in case of fraud, 36 ALR 698.

Right to secure new or successive notice of lis pendens in same or new action after loss or cancellation of original notice, 52 ALR2d 1308.

23-3-63. Submission to special master.

The court, upon receipt of the petition together with the plat and instruments filed therewith, shall submit the same to a special master who shall be a person who is authorized to practice law in this state and is a resident of the judicial circuit wherein the action is brought. (Ga. L. 1966, p. 443, § 3.)

JUDICIAL DECISIONS

Cited in Georgia, A.S. & C. Ry. v. Johnson, 226 Ga. 358, 174 S.E.2d 895 (1970); McGee v. Craig, 230 Ga. 553, 198 S.E.2d 165 (1973); South DeKalb Family Branch of YMCA of Metropolitan Atlanta, Inc. v. Frazier, 236 Ga. 903, 225 S.E.2d 890 (1976); Thornton v. Reb Properties, Inc., 237 Ga. 59, 226 S.E.2d 741 (1976); Higdon v. Gates, 238 Ga. 105, 231 S.E.2d 345 (1976); Capers v. Camp, 244 Ga. 7, 257 S.E.2d 517 (1979); In re Rivermist Homeowners Ass'n, 244 Ga. 515, 260 S.E.2d 897 (1979).

23-3-64. Other required evidence.

The master shall examine the petition, plat, and all documents filed therewith and may require other evidence to be filed, including, but not limited to, an abstract of title. (Ga. L. 1966, p. 443, § 4.)

JUDICIAL DECISIONS

Cited in Capers v. Camp, 244 Ga. 7, 257 S.E.2d 517 (1979); In re Rivermist Homeowners Ass'n, 244 Ga. 515, 260 S.E.2d 897 (1979).

23-3-65. Notice; process; service by publication; filing of adverse pleading; appointment of disinterested representative.

(a) Upon the filing of all evidence with him, the master shall:

(1) Determine who is entitled to notice, including, but not limited to, all adjacent landowners and all adverse claimants as to whose adverse claims petitioner has actual or constructive notice;

(2) Cause process to issue, directed to all persons who are entitled to notice and to all other persons whom it may concern.

(b) Process shall be served upon known persons whose residence is ascertainable by the sheriff or his deputy as provided by law. In all cases where service by publication is permitted under the laws and where the respondent or other party resides outside this state or whose residence is unknown and it is necessary to perfect service upon such person by

publication, upon the fact being made to appear to the judge or clerk of the court in which the action is pending, the judge or clerk may order service to be perfected by publication in the paper in which sheriffs' advertisements are printed, four times within the ensuing 30 days, publications to be weekly. The published notice shall contain the name of the petitioner and respondent with a caption setting forth the court, the character of the action, the date the action was filed, the date of the order for service by publication, and a notice directed and addressed to the party to be thus served, commanding him to be and appear at the court in which the action is pending within 30 days of the date of the order for service by publication, and shall bear teste in the name of the judge and shall be signed by the clerk of the court. The date upon which the nonresident or party whose residence is unknown is called upon to appear shall be the appearance day of the case.

(c) Any adverse party shall be entitled to have at least 30 days after completion of service to file any pleading he desires in the matter before the court.

(d) If, upon the filing of the petition or of the evidence required by him, the master finds that there are persons under a disability, or minors, or persons not in being, unascertained, or unknown who may have an interest, he shall appoint a disinterested person, in the nature of a guardian ad litem, who shall be served with copies of the notice prescribed and who shall represent these interests. (Ga. L. 1966, p. 443, § 5.)

JUDICIAL DECISIONS

Cited in Pittard v. McMillon, 225 Ga. S.E.2d 517 (1979); In re Rivermist 239, 167 S.E.2d 644 (1969); Barrett v. Homeowners Ass'n, 244 Ga. 515, 260 S.E.2d 897 (1979).
Simmons, 235 Ga. 600, 221 S.E.2d 25 (1975); Capers v. Camp, 244 Ga. 7, 257

RESEARCH REFERENCES

ALR. — Right to secure new or successive notice of lis pendens in same or new action after loss or cancellation of original notice, 52 ALR2d 1308.

23-3-66. Jurisdiction of special master; trial by jury.

Upon reasonable notice to the parties, after proof of serving notice as required by this article has been filed and after the appointment of the disinterested person as representative where required, the special master shall have complete jurisdiction within the scope of the pleadings to ascertain and determine the validity, nature, or extent of petitioner's title and all other interests in the land, or any part thereof, which may be

adverse to the title claimed by the petitioner, or to remove any particular cloud or clouds upon the title to the land and to make a report of his findings to the judge of the court; provided, however, any party to this proceeding may demand a trial by a jury of any question of fact; provided, further, that the master on his own initiative may require a trial by a jury of any question of fact. (Ga. L. 1966, p. 443, § 6.)

Law reviews. — For article surveying development of equity and the right to trial by jury in equity actions in Georgia, and

advocating use of jury to try issues of fact in equitable actions, see 8 Mercer L. Rev. 225 (1957).

JUDICIAL DECISIONS

Demand for jury trial must be filed prior to ruling by special master. — In proceedings to remove a cloud on title, a demand for a jury trial cannot be filed after the special master has ruled on the questions of law and fact in the case and submitted his report to the trial court. The judgment entered by the trial court is thus a final judgment to which a notice of appeal must be filed within 30 days. *Thornton v. Reb Properties, Inc.*, 237 Ga. 59, 226 S.E.2d 741 (1976); *Higdon v. Gates*, 238 Ga. 105, 231 S.E.2d 345 (1976).

This section requires counsel to demand a jury trial for the resolution of any factual issues in the case prior to the time it is heard by the special master. If no demand

is filed prior to the time he hears the case, the special master is the arbiter of law and fact and decides all issues in the case unless the master on his own initiative requires a trial by jury of any question of fact. *Thornton v. Reb Properties, Inc.*, 237 Ga. 59, 226 S.E.2d 741 (1976).

Cited in *Pittard v. McMillon*, 225 Ga. 239, 167 S.E.2d 644 (1969); *McGee v. Craig*, 230 Ga. 553, 198 S.E.2d 165 (1973); *Lawhorn v. Steele*, 232 Ga. 857, 209 S.E.2d 191 (1974); *Heath v. Stinson*, 238 Ga. 364, 233 S.E.2d 178 (1977); *Capers v. Camp*, 244 Ga. 7, 257 S.E.2d 517 (1979); *In re Rivermist Homeowners Ass'n*, 244 Ga. 515, 260 S.E.2d 897 (1979); *Duncan v. First Nat'l Bank*, 597 F.2d 51 (5th Cir. 1979).

RESEARCH REFERENCES

ALR. — Right to jury trial in suit to remove cloud, quiet title, or determine adverse claims, 117 ALR 9.

23-3-67. Decree; effect of recordation.

Upon the receipt of the master's report or upon a jury verdict, the court shall issue a decree which shall be recorded in the office of the clerk of the superior court of the county or counties wherein the land affected lies and which, when recorded, shall operate to bind the land affected according to the tenor thereof and shall be conclusive upon and against all persons named therein, known or unknown. A marginal reference to the recorded judgments and decree shall be entered upon any recorded instrument stated to be affected thereby. (Ga. L. 1966, p. 443, § 7.)

JUDICIAL DECISIONS

Demand for jury trial deemed untimely unless filed prior to consideration by special master. — Where a petitioner fails to file a demand for a jury trial prior to the time the case is heard by a special master, the demand is considered untimely, and will be denied. *Brown v. Wilson*, 240 Ga. 856, 242 S.E.2d 603 (1978).

Cited in *Thornton v. Reb Properties, Inc.*, 237 Ga. 59, 226 S.E.2d 741 (1976); *Heath v. Stinson*, 238 Ga. 364, 233 S.E.2d 178 (1977); *Glenn v. Allen*, 239 Ga. 646, 238 S.E.2d 438 (1977); *Capers v. Camp*, 244 Ga. 7, 257 S.E.2d 517 (1979); *In re Rivermist Homeowners Ass'n*, 244 Ga. 515, 260 S.E.2d 897 (1979).

23-3-68. Compensation of master and representative; taxing as part of costs.

The court shall fix a reasonable compensation, not less than \$50.00, to be paid to the master appointed under this part and shall fix the compensation to be paid to any representative in the nature of a guardian ad litem appointed under this part. These fees are to be taxed in the discretion of the court as a part of the costs. (Ga. L. 1966, p. 443, § 8.)

JUDICIAL DECISIONS

The award of compensation to the special master is a part of the costs under this section and does not affect the finality of the judgment for purposes of appeal. *Green v. Kaplan*, 237 Ga. 602, 229 S.E.2d 369 (1976).

Cited in *Capers v. Camp*, 244 Ga. 7, 257 S.E.2d 517 (1979); *In re Rivermist Homeowners Ass'n*, 244 Ga. 515, 260 S.E.2d 897 (1979).

23-3-69. Intervention after entering of decree.

At any time within 30 days from the entering of the final decree, any person not previously a party who claims an interest in the land may intervene, in which event the case shall be reopened as to that party so that his rights may be adjudicated. (Ga. L. 1966, p. 443, § 9.)

JUDICIAL DECISIONS

Cited in *Heath v. Stinson*, 238 Ga. 364, 233 S.E.2d 178 (1977); *Capers v. Camp*, 244 Ga. 7, 257 S.E.2d 517 (1979); *In re*

Rivermist Homeowners Ass'n, 244 Ga. 515, 260 S.E.2d 897 (1979).

RESEARCH REFERENCES

Am. Jur. 2d. — 65 Am. Jur. 2d, Quieting Title and Determination of Adverse Claims, § 71.

ALR. — Who may intervene in suit to quiet title, 170 ALR 149.

23-3-70. Joinder.

(a) Two or more persons having separate and distinct parcels of land in the same county and holding under the same source of title or persons having separate and distinct interests in the same parcel or parcels may join in a petition under this part against the same supposed claimants.

(b) A petitioner may join separate causes of action in one petition; but, if they cannot be conveniently disposed of together, the court may order separate trials. (Ga. L. 1966, p. 443, § 10.)

JUDICIAL DECISIONS

Cited in *Capers v. Camp*, 244 Ga. 7, 257 S.E.2d 517 (1979); *Homeowners Ass'n*, 244 Ga. 515, 260 S.E.2d 897 (1979).

RESEARCH REFERENCES

Am. Jur. 2d. — 65 Am. Jur. 2d, Quieting Title and Determination of Adverse Claims, § 72.

23-3-71. Liberal construction.

This part shall be liberally construed. (Ga. L. 1966, p. 443, § 12.)

JUDICIAL DECISIONS

Cited in *Heath v. Stinson*, 238 Ga. 364, 233 S.E.2d 178 (1977); *Capers v. Camp*, 244 Ga. 7, 257 S.E.2d 517 (1979); *Rivermist Homeowners Ass'n*, 244 Ga. 515, 260 S.E.2d 897 (1979).

23-3-72. Remedy cumulative.

The remedy provided by this part is intended to be cumulative and not exclusive. (Ga. L. 1966, p. 443, § 13.)

JUDICIAL DECISIONS

Cited in *Heath v. Stinson*, 238 Ga. 364, 233 S.E.2d 178 (1977); *Capers v. Camp*, 244 Ga. 7, 257 S.E.2d 517 (1979); *In re Rivermist Homeowners Ass'n*, 244 Ga. 515, 260 S.E.2d 897 (1979).

ARTICLE 4

EQUITABLE INTERPLEADER

Cross references. — As to interpleader generally, see § 9-11-22.

23-3-90. Interpleader; when compelled; taxing of costs, attorney's fees.

(a) Whenever a person is possessed of property or funds or owes a debt or duty, to which more than one person lays claim of such a character as to render it doubtful or dangerous for the holder to act, he may apply to equity to compel the claimants to interplead.

(b) If the person bringing the action has to make or incur any expenses in so doing, including attorney's fees, the amount so incurred shall be taxed in the bill of costs, under the approval of the court, the court in its discretion determining the amount of the attorney's fees, and shall be paid by the parties cast in the action as other costs are paid. (Orig. Code 1863, § 3156; Code 1868, § 3168; Code 1873, § 3235; Code 1882, § 3235; Civil Code 1895, § 4896; Civil Code 1910, § 5471; Code 1933, § 37-1503; Ga. L. 1952, p. 90, § 1.)

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

REQUISITES FOR MAINTENANCE OF INTERPLEADER

1. CLOSE QUESTION OF LAW, CONFLICTING CLAIMS, AND DISINTERESTED STAKEHOLDER
2. LIABILITY OF PETITIONER
3. EXISTENCE OF REASONABLE DANGER OR DOUBT

EFFECT OF PETITION GENERALLY

PLEADING AND PRACTICE

General Consideration

Cited in *McKinney v. Daniels*, 135 Ga. 157, 68 S.E. 1095 (1910); *Fourth Nat'l Bank v. Lattimore*, 168 Ga. 547, 148 S.E. 396 (1929); *Bonner v. Merchants' Bank*, 168 Ga. 782, 149 S.E. 133 (1929); *Ewing v.*

Tanner, 184 Ga. 773, 193 S.E. 243 (1937); *Freeman v. Atlanta Police Relief Ass'n*, 62 Ga. App. 523, 8 S.E.2d 711 (1940); *Tinney v. Green*, 90 Ga. App. 321, 83 S.E.2d 65 (1954); *Morris v. Fulton County Fed. Sav. & Loan Ass'n*, 211 Ga. 900, 89 S.E.2d 489 (1955); *Fulton Nat'l Bank of Atlanta v.*

Block, 215 Ga. 602, 112 S.E.2d 616 (1960); Ayers v. Baker, 216 Ga. 132, 114 S.E.2d 847 (1960); Adrian Lumber Co. v. Gillis, 219 Ga. 180, 132 S.E.2d 186 (1963); Russell v. Ware, 108 Ga. App. 628, 134 S.E.2d 48 (1963); Hudson v. Hudson, 220 Ga. 730, 141 S.E.2d 453 (1965); Algernon Blair, Inc. v. Trust Co., 224 Ga. 118, 160 S.E.2d 395 (1968); Adler v. Ormond, 117 Ga. App. 600, 161 S.E.2d 435 (1968); Sanders v. Carney, 224 Ga. 429, 162 S.E.2d 351 (1968); Gill v. Myrick, 228 Ga. 253, 185 S.E.2d 72 (1971); Leon Inv. Co. v. Independent Life & Accident Co., 123 Ga. App. 668, 182 S.E.2d 151 (1971); Williams v. Overstreet, 230 Ga. 112, 195 S.E.2d 906 (1973); Farris v. United States, 230 Ga. 862, 199 S.E.2d 782 (1973); C & S Land, Transp. & Dev. Corp. v. Grubbs, 141 Ga. App. 393, 233 S.E.2d 486 (1977); Blaylock v. Georgia Mut. Ins. Co., 239 Ga. 462, 238 S.E.2d 105 (1977); Paulding County v. City of Hiram, 240 Ga. 220, 240 S.E.2d 71 (1977).

Requisites for Maintenance of Interpleader

1. Close Question of Law, Conflicting Claims, and Disinterested Stakeholder

Petition for interpleader requires existence of close question of law or fact. — Before a claim will be held to be of such character as to render it doubtful or dangerous for the holder to act, there must be a close question of law or fact. *Almand v. Reese*, 209 Ga. 138, 71 S.E.2d 223 (1952).

A state depository having state funds on deposit when the state treasurer is suspended and another is appointed to the office pending the suspension may discharge its obligation to the state by accounting for the funds to the appointee, in such case an interpleader will not lie on behalf of the state depository to determine to whom it shall pay the money, whether to the suspended officer or to the appointee, because the law is clear that the appointee is entitled to receive the funds. *Daniel v. Citizens & S. Nat'l Bank*, 182 Ga. 384, 185 S.E. 696 (1936).

A bank which has rented a deposit box to which widow and administrator of deceased husband's estate claim right of entry need not decide at its peril either close questions of fact or nice questions of

law; nevertheless, when it is in possession of all the facts and the questions of law are not intricate or debatable, a petition for interpleader will be denied. *Mandeville v. First Nat'l Bank*, 206 Ga. 426, 57 S.E.2d 553 (1950); *Gunby v. Harper*, 216 Ga. 94, 114 S.E. 856 (1960).

Trial court properly granted relief sought by amended petition for interpleader and for certain injunctive relief against contractor and other named persons who had supplied him building material and performed labor for him in repairing a building which the petitioners owned, and who had instituted proceedings to foreclose liens against the repaired property. *Bryant v. Haygood*, 216 Ga. 561, 118 S.E.2d 469 (1961).

Concerning conflicting claims to a fund. — It is essential to the maintenance of a petition for interpleader that there be at least two persons, having conflicting claims, each apparently well founded, to a fund in the hands of a person having no interest in or claim thereon, and who, as between the conflicting claimants, is perfectly indifferent. *Davis v. Davis*, 96 Ga. 136, 21 S.E. 1002 (1895); *Miller Hotel Co. v. Chastaine*, 183 Ga. 172, 188 S.E. 4 (1936); *Mullins v. Autry*, 200 Ga. 645, 38 S.E.2d 390 (1946).

The general doctrine is, that interpleader lies, where two or more persons claim the same thing, under different titles, or in separate interests, from another person, who, not claiming any title or interest therein himself, and not knowing to which of the claimants he ought of right to render the duty claimed, or to deliver the property claimed, is either molested by an action or actions brought against him, or fears he may suffer injury, from the conflicting claims of the parties against him. *Johnson v. Harbison-Walker Mining Co.*, 181 Ga. 630, 183 S.E. 791 (1936).

Conflicting claims must be of such character as to justify a reasonable doubt or reasonable apprehension of danger in order that resort may be had to a court of equity. *Reed v. Metropolitan Life Ins. Co.*, 206 Ga. 604, 58 S.E.2d 183 (1950).

Petition for interpleader brought by insurer, alleging that the insured changed the beneficiary named in the policy prior to his death, without alleging when or how the

change was made, setting forth a copy of the policy, or stating whether or not the insured reserved to himself the right to change the beneficiary, was insufficient to inform the court of the nature, character, and foundation of the claim so as to enable the court to determine whether or not an interpleader was essential to the plaintiff's protection, and the trial court erred in overruling the general demurrer (now motion to dismiss) to the petition. *Lowery v. Independent Life & Accident Ins. Co.*, 209 Ga. 753, 76 S.E.2d 5 (1953).

In the hands of a disinterested person.

— In the case of a petition of strict interpleader, the petitioner must be an indifferent stakeholder, without interest in the subject matter. *Phillips v. Kelly*, 176 Ga. 111, 167 S.E. 281 (1932).

A necessary ingredient of equitable interpleader is that the stakeholder must be disinterested. *Midland Nat'l Life Ins. Co. v. Emerson*, 121 Ga. App. 427, 174 S.E.2d 211 (1970).

One who seeks the aid of a court by petition for interpleader must claim no right in opposition to the claimants to the fund. *Holland v. Sterling*, 214 Ga. 583, 105 S.E.2d 894 (1958).

Where the defendant is not disinterested, as where he denies liability to the plaintiff as well as the other two parties, the action cannot be classified as a pleading for equitable interpleader. *Midland Nat'l Life Ins. Co. v. Emerson*, 121 Ga. App. 427, 174 S.E.2d 211 (1970).

The petition in the nature of interpleader cannot be maintained where plaintiffs allege that neither of defendants has any right or title to, or any interest in, the subject matter of the action, nor unless the relief sought is equitable relief. *Phillips v. Kelly*, 176 Ga. 111, 167 S.E. 281 (1932).

2. Liability of Petitioner

It is essential to an interpleader that the plaintiff be liable to only one of the defendants and never by any possibility to both. *Finance Co. v. Jones Co.*, 141 Ga. 619, 81 S.E. 1033 (1914); *Lilley v. Nixon*, 214 Ga. 548, 105 S.E.2d 716 (1958).

To entitle a person to a petition of interpleader, he must be in a position in which he is liable to one of two or more persons, who claim from him the same debt

or duty; and he claims no right in opposition to the claimants or either of them; and he does not know to whom he ought, of right, to render the debt or duty. *Phillips v. Kelly*, 176 Ga. 111, 167 S.E. 281 (1932).

Where there is a question of double liability and not of double vexation for one liability, the plaintiff is not in that disinterested attitude as to the conflicting claimants which is essential to a petition of interpleader. *Lilley v. Nixon*, 214 Ga. 548, 105 S.E.2d 716 (1958).

If the question is not to which one of two or more claimants a single duty or debt should be rendered or paid or the same property should be delivered, but whether the person filing the proceeding is liable to each of two holders of different negotiable promissory notes transferred to them respectively before due, on which separate suits have been brought, whether they are not bona fide holders for value and without notice, and whether the debtor has a defense as against each or either of them, arising out of transactions with the original payee, this presents no case of a double claim to one debt or liability but a case of whether there is a double liability, and does not authorize a proceeding for interpleader proper. *Gardner v. Haas, Howell & Dodd, Inc.*, 178 Ga. 685, 173 S.E. 863 (1934).

Petition by the owner of a tract of real estate, seeking to require two brokers with whom the plaintiff had listed the property, to interplead and set up their claims for one commission growing out of a sale of the property, failed to set forth a cause of action for interpleader, since two separate contracts of listing were alleged and there was a possibility under the allegations of the petition that the plaintiff might be liable to both parties. *Lilley v. Nixon*, 214 Ga. 548, 105 S.E.2d 716 (1958).

Where the proceeds of a life insurance policy are claimed by the insured's mother, as the original beneficiary, by the insured's wife, as the new beneficiary at the insured's direction to the insurer, and by the children, based on an instrument by the wife and mother establishing a trust for the benefit of the children, the essential for interpleaders are present. *Kimbrell v. Lincoln Nat'l Life Ins. Co.*, 217 Ga. 335, 122 S.E.2d 94 (1961).

3. Existence of Reasonable Danger or Doubt

Real doubt or danger alone authorizes one to file a petition for interpleader. — It must appear from the allegations of the petition that the conflicting claims of the defendants are of such character as to render it doubtful or dangerous for the plaintiff to act; and in order to do this it is necessary that such claims be set forth so as to inform the court of their nature, character, and foundation, certainly to the extent of enabling the court to determine whether or not an interpleader is essential to the plaintiff's protection. *Mullins v. Autry*, 200 Ga. 645, 38 S.E.2d 390 (1946); *Lilley v. Nixon*, 214 Ga. 548, 105 S.E.2d 716 (1958).

When two or more persons claim the same thing, by different and separate interests, and another person, not knowing to which of the claimants he ought of right to render a debt or duty, or to deliver property in his custody, fears he may be hurt by some of them, he may exhibit a petition of interpleader against them. *Johnson v. Harbison-Walker Mining Co.*, 181 Ga. 630, 183 S.E. 791 (1936).

But a stakeholder is not entitled to protection by a court to the extent of being saved from all shadow of risk; and so where he is in possession of all the facts and there is no question of law which is reasonably debatable, his petition for interpleader should be denied. *Citizens Bank v. Middlebrooks*, 209 Ga. 330, 72 S.E.2d 298 (1952); *Lowery v. Independent Life & Accident Ins. Co.*, 209 Ga. 753, 76 S.E.2d 5 (1953); *Lilley v. Nixon*, 214 Ga. 548, 105 S.E.2d 716 (1958).

In order for a mere stakeholder to invoke the aid of a court of equity by interpleader, it is not necessary that suits actually be filed by all of the claimants, or that there will necessarily be double liability; one of the objects to be accomplished by interpleader is to avoid the danger of a double vexation against a single liability. *Johnson v. Harbison-Walker Mining Co.*, 181 Ga. 630, 183 S.E. 791 (1936).

If a holder knows all the facts, and the questions of law are not intricate or debatable, a petition for interpleader will not lie; but it is not incumbent upon the holder "to decide at his peril either close questions of

fact, or nice questions of law"; and in such a case he may require the parties at interest to set up their claims for determination. *Cannon v. Williams*, 194 Ga. 808, 22 S.E.2d 838 (1942).

Therefore, the doubt or danger that would authorize an interpleader must be reasonable. *Daniel v. Citizens & S. Nat'l Bank*, 182 Ga. 384, 185 S.E. 696 (1936).

Before one occupying the situation of a stakeholder can call upon adverse claimants of a fund in his hands to interplead, he must satisfactorily show to the court that their claims have such a foundation in law as will create a reasonable doubt as to his safety in undertaking to determine for himself to whom the fund belongs. *Smith v. Folsom*, 190 Ga. 460, 9 S.E.2d 824 (1940).

And the doubt or danger may arise either in law or in fact as to the person to whom the money should be paid. *Daniel v. Citizens & S. Nat'l Bank*, 182 Ga. 384, 185 S.E. 696 (1936).

It must appear from the allegations of the petition that the conflicting claims of the defendants are of such character as to render it doubtful or dangerous for the plaintiff to act; and in order to do this it is necessary that such claims be set forth so as to inform the court of their nature, character, and foundation, certainly to extent of enabling the court to determine whether or not an interpleader is essential to the plaintiff's protection. *Gardner v. Haas, Howell & Dodd, Inc.*, 178 Ga. 685, 173 S.E. 863 (1934); *Lowery v. Independent Life & Accident Ins. Co.*, 209 Ga. 753, 76 S.E.2d 5 (1953).

Effect of Petition Generally

The complainant in a petition of interpleader merely stirs up a war and then leaves the real belligerents to fight it out, he retiring from the scene to repose in dignified ease, holding, the while, the prize which is to reward the victor. *Perkins & Littlefield v. Trippe*, 40 Ga. 225 (1869); *Smith v. Folsom*, 190 Ga. 460, 9 S.E.2d 824 (1940).

Where the owner of property has in his possession funds due under a contract for the erection of a house, which are claimed by the materialmen under an asserted equitable assignment from the contractor and by the trustee of the contractor, who has

since been adjudicated a bankrupt, the owner may bring the funds into court and maintain a petition for interpleader to compel the conflicting claimants to litigate between themselves their respective rights thereto. *Smith v. Folsom*, 190 Ga. 460, 9 S.E.2d 824 (1940).

Where petition for interpleader showed that the defendant insurer owed the beneficiary of two life insurance policies purchased by the deceased an undisputed amount, that two persons have made demands on it for the payment of such proceeds, each claiming to be the legal beneficiary of the policies, and that their conflicting claims are of such a character as to render it doubtful or dangerous for it to act, the judgment permitting the defendant to pay the full amount due on the policies into the registry of the court and then be discharged from further liability was not erroneous. *Sanders v. Progressive Life Ins. Co.*, 212 Ga. 674, 94 S.E.2d 871 (1956).

And on the trial of interpleader each of the claimants occupies the position of plaintiff, and must recover on the strength of his own title rather than on the weakness of the other's title. *Johnson v. Harbison-Walker Mining Co.*, 181 Ga. 630, 183 S.E. 791 (1936).

After a decree has been entered, ordering the petitioner to pay the fund in question into court and ordering the claimants to interplead and set up their claims to the fund, a suit in interpleader becomes, in effect, a proceeding between the claimants

alone as adversaries to determine who is entitled to the fund, and the verdict was properly limited to the determination of this issue. *Smith v. Folsom*, 190 Ga. 460, 9 S.E.2d 824 (1940).

Pleading and Practice

Interpleader actions may be instituted in Georgia under this article or under § 9-11-22. *Stone v. Davis*, 242 Ga. 17, 247 S.E.2d 756 (1978).

The remedy for interpleader provided for in § 9-11-22 is in addition to and in no way supersedes or limits the remedy of equitable interpleader provided for in this article. *Stone v. Davis*, 242 Ga. 17, 247 S.E.2d 756 (1978).

Section 9-11-22 has broadened and liberalized the rules relating to the remedy of interpleader so as to render the technicalities formally associated with the equitable remedy of a strict bill of interpleader no longer applicable to complaints tried under that section. *Stone v. Davis*, 242 Ga. 17, 247 S.E.2d 756 (1978).

Permission to interplead a trustee need not be secured from the court of bankruptcy which appointed him, since an interpleader suit is not an interference with, and cannot mature into a charge on, the assets of bankrupt. *Smith v. Folsom*, 190 Ga. 460, 9 S.E.2d 824 (1940).

Time of filing. — The petition should be filed before either claimant has had his right established by judgment. *Brown v. Wilson*, 56 Ga. 534, (1876); *Moore v. Hill*, 59 Ga. 760 (1877). See 7 Enc. Dig. 753.

RESEARCH REFERENCES

ALR. — Right of judgment debtor to interplead, 48 ALR 966.

Nature and extent of relief of successful intervener or interpleader in attachment, 66 ALR 908.

Right of owner to maintain bill of interpleader against contractor and lien claimants and others in respect of fund arising from construction contracts, 70 ALR 515.

Right of trustee, executor, or administrator to maintain interpleader, 152 ALR 1122.

Insurance: facility of payment clause, 166 ALR 10.

Allowance of interest on interpleaded or impleaded disputed funds, 15 ALR2d 473.

Corporation's right to interplead claimants to dividends, 46 ALR2d 980.

Allowance of attorney's fees to party interpleading claimants to funds or property, 48 ALR2d 190.

Amount of attorney's compensation in absence of contract or statute fixing amount, 57 ALR3d 475; 57 ALR3d 550; 57 ALR3d 584; 58 ALR3d 201; 58 ALR3d 235; 58 ALR3d 317; 59 ALR3d 152.

23-3-91 EQUITABLE REMEDIES AND PROCEEDINGS GENERALLY 23-3-110

Right of party who is an attorney and appears for himself to award of attorney's fees against opposing party as element of costs, 78 ALR3d 1119.

23-3-91. Verification of petition.

Every petition for interpleader shall be verified and shall show that the petitioner is not in collusion with any party claiming the property. (Civil Code 1895, § 4897; Civil Code 1910, § 5472; Code 1933, § 37-1504.)

History of section. — This section is derived from the decisions in *Burton v. Black*, 32 Ga. 53 (1861) and *Tyus v. Rust*, 37 Ga. 574 (1868).

JUDICIAL DECISIONS

Cited in *Davis v. Davis*, 96 Ga. 136, 21 S.E. 1002 (1895); *Campbell v. Trust Co.*, 197 Ga. 37, 28 S.E.2d 471 (1943); *Adler v. Ormond*, 117 Ga. App. 600, 161 S.E.2d 435 (1968); *White v. Georgia Farm Bureau Mut. Ins. Co.*, 234 Ga. 186, 215 S.E.2d 240 (1975); *Stone v. Davis*, 242 Ga. 17, 247 S.E.2d 756 (1978).

23-3-92. Collateral interpleader.

If, in the progress of any proceeding in equity, the court perceives the necessity for parties to interplead, it may order such interpleader as collateral and ancillary to the main case. (Orig. Code 1863, § 3157; Code 1868, § 3169; Code 1873, § 3236; Code 1882, § 3236; Civil Code 1895, § 4898; Civil Code 1910, § 5473; Code 1933, § 37-1505.)

Law reviews. — For article discussing aspects of third-party practice (impleader) under the Georgia Civil Practice Act, see 4 Ga. St. B.J. 355 (1968).

JUDICIAL DECISIONS

Cited in *Goodwin v. Bowers*, 169 Ga. 36, 149 S.E. 567 (1929); *Adler v. Ormond*, 117 Ga. App. 600, 161 S.E.2d 435 (1968); *C & S Land, Transp. & Dev. Corp. v. Grubbs*, 141 Ga. App. 393, 233 S.E.2d 486 (1977); *Stone v. Davis*, 242 Ga. 17, 247 S.E.2d 756 (1978).

ARTICLE 5

BILLS OF PEACE

23-3-110. Bill of peace; when entertained; ancillary injunction.

(a) It being the interest of this state that there shall be an end of litigation, equity will entertain a bill of peace:

(1) To confirm some right which has been previously satisfactorily established by more than one legal trial and is likely to be litigated again;

(2) To avoid a multiplicity of actions by establishing a right, in favor of or against several persons, which is likely to be the subject of legal controversy; or

(3) In other similar cases.

(b) As ancillary to this jurisdiction, equity will grant perpetual injunctions. (Orig. Code 1863, §§ 3154, 3155; Code 1868, §§ 3166, 3167; Code 1873, §§ 3233, 3234; Code 1882, §§ 3233, 3234; Civil Code 1895, §§ 4894, 4895; Civil Code 1910, §§ 5469, 5470; Code 1933, §§ 37-1501, 37-1502.)

Law reviews. — For article discussing aspects of third-party practice (impleader)

under the Georgia Civil Practice Act, see 4 Ga. St. B.J. 355 (1968).

JUDICIAL DECISIONS

Purpose of section. — The principle upon which courts exercising equitable jurisdiction interfere and grant relief is to suppress useless litigation; to prevent multiplicity of suits; to restrain oppressive litigation and to prevent irreparable mischief. *Bond v. Little*, 10 Ga. 395 (1851); *Sutton v. Adams*, 180 Ga. 48, 178 S.E. 365 (1934); *Consumers Fin. Corp. v. Lamb*, 217 Ga. 359, 122 S.E.2d 101 (1961); *Allstate Ins. Co. v. Hill*, 218 Ga. 430, 128 S.E.2d 321 (1962).

The complainant's right must be satisfactorily established at law before equity will interfere. *Bond v. Little*, 10 Ga. 395 (1851).

And where the relief can be clearly afforded at law, this section does not apply. *Guess v. Stone Mt. Granite & Ry.*, 67 Ga. 215 (1881); *Mayor of Gainesville v. Dean*, 124 Ga. 750, 53 S.E. 183 (1906).

While avoidance of a multiplicity of suits may, in a proper case, be considered as an independent ground of equitable jurisdiction, and not a mere auxiliary to other equities present, it does not alone create an equitable cause of action, regardless of other circumstances. *Dobbs v. Federal Deposit Ins. Corp.*, 187 Ga. 569, 1 S.E.2d 672 (1939).

Where the acts of the heir's agent, in charge of operating the decedent's corpo-

ration, in mismanaging the corporation, substantially the entire stock of which was owned by the estate, were continuous, still threatened and directly affected the value of the stock, whether the alleged acts are deemed trespasses or waste, it was unnecessary to go further and allege that the defendant was insolvent, since equity is empowered to enjoin such acts, where they would otherwise be likely to give rise to multiplicity of separate suits by the individual heirs against the agent. *Shingler v. Shingler*, 184 Ga. 671, 192 S.E. 824 (1937).

Cited in *Meyer & Ullman v. Coley*, 80 Ga. 207, 7 S.E. 164 (1887); *Orton v. Madden*, 75 Ga. 83 (1885); *Lightner v. Belk*, 178 Ga. 766, 174 S.E. 349 (1934); *Hollingsworth v. People's Bank*, 179 Ga. 704, 177 S.E. 743 (1934); *Banner v. Cohen*, 182 Ga. 271, 185 S.E. 333 (1936); *Grimmett v. Barnwell*, 184 Ga. 461, 192 S.E. 191 (1937); *Shingler v. Shingler*, 184 Ga. 671, 192 S.E. 824 (1937); *Ewing v. Tanner*, 184 Ga. 773, 193 S.E. 243 (1937); *Groover v. Brandon*, 200 Ga. 153, 36 S.E.2d 84 (1945); *Harris v. Rowe*, 200 Ga. 265, 36 S.E.2d 787 (1946); *Avary v. Avary*, 202 Ga. 22, 41 S.E.2d 314 (1947); *Worley v. Gaston*, 210 Ga. 350, 80 S.E.2d 304 (1954); *Kirchman v. Kirchman*, 212 Ga. 488, 93 S.E.2d 685 (1956); *Montgomery v. Pierce*, 212 Ga. 545, 93 S.E.2d 758 (1956); *Ayers v.*

Baker, 216 Ga. 132, 114 S.E.2d 847 (1960); Maddox v. Dixie Feeds, Inc., 218 Ga. 378, 127 S.E.2d 918 (1962); Timeplan Loan & Inv. Corp. v. Morehead, 220 Ga. 762, 141 S.E.2d 420 (1965); Gill v. Myrick, 228 Ga. 253, 185 S.E.2d 72 (1971); C & S Land, Transp. & Dev. Corp. v. Grubbs, 141 Ga. App. 393, 233 S.E.2d 486 (1977).

OPINIONS OF THE ATTORNEY GENERAL

Justices of the peace may not issue bills of peace. — Since the superior court has exclusive jurisdiction over equity matters and a bill of peace is an equitable remedy, justices of the peace do not have jurisdic-

tion to entertain a petition for such relief; it follows that any such bill of peace issued by a justice of the peace would be void and of no effect. 1957 Op. Att'y Gen. p. 66.

RESEARCH REFERENCES

ALR. — Constitutionality of statute conferring on chancery courts power to abate public nuisance, 22 ALR 542; 75 ALR 1298.

Avoidance of multiplicity of suits as ground of jurisdiction in equity of a suit by one out of possession to quiet title against

persons in possession of different portions of the land in severalty, 30 ALR 109.

Propriety of permanently enjoining one guilty of unauthorized use of trade secret from engaging in sale or manufacture of device in question, 38 ALR3d 572.

CHAPTER 4
EQUITY PROCEDURE

Article 1

General Provisions

- Sec.
23-4-1. Consolidation of actions.
23-4-2. How extraordinary remedies claimed.
23-4-3. Claim of legal and equitable relief by defendant.
23-4-4. Proceedings ex parte or in execution of protective powers; petition.
23-4-5. Receipt of and action on petition; transmittal of proceedings to clerk.

Article 2

Parties

- 23-4-20. Who may complain in equity.

Article 3

Decrees

- Sec.
23-4-30. Nature of decree; signature and entry.
23-4-31. Power of court to mold and enforce decrees.
23-4-32. Decree affecting property outside jurisdiction.
23-4-33. Decree in will or contract matters; consent of guardian or guardian ad litem.
23-4-34. Interlocutory decrees and orders.
23-4-35. Confirmation of sales under decrees.
23-4-36. Decree transferable; lien.
23-4-37. Attachments for contempt; executions against property.
23-4-38. Enforcement of extraordinary remedies.

ARTICLE 1
GENERAL PROVISIONS

23-4-1. Consolidation of actions.

Where there is one common claim to be asserted by or against several, and one is asserting the claim against many, or many against one, the court may utilize equitable powers to consolidate and determine the whole matter in one action. (Civil Code 1895, § 4846; Civil Code 1910, § 5419; Code 1933, § 37-1007.)

Law reviews. — For article comparing sections of the Georgia Civil Practice Act with preexisting provisions of the Georgia Code, see 3 Ga. St. B.J. 295 (1967).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

PROPER PARTIES

JURISDICTION GENERALLY

PLEADING AND PRACTICE

General Consideration

History of section generally. — This section appears to have been codified from the decision in *Smith v. Dobbins*, 87 Ga. 303, 13 S.E. 496 (1891), where it was held that where several executions are levied upon the property of the same defendant, and one person files a separate claim in resistance to each levy, such claimant is entitled to proceed in equity against all the plaintiffs in execution, where the validity of the executions all involved the same question. *Dobbs v. Federal Deposit Ins. Corp.*, 187 Ga. 569, 1 S.E.2d 672 (1939).

Purpose of section. — This section allowing actions to be joined in order to avoid a multiplicity of suits is primarily for the convenience of parties to the case; and according to a number of authorities, whether it will be allowed is a question largely to be determined by the circumstances in the case. *Lyle v. Keehn*, 195 Ga. 508, 24 S.E.2d 655 (1943).

In equitable proceedings a judge of the superior court is empowered to consolidate two or more cases, in order to avoid useless consumption of the time of the court and needless expense to the taxpayers. *O'Malley v. Wilson*, 182 Ga. 97, 185 S.E. 109 (1936).

This section applies only where there is one common right, and one is asserting the right against many or many against one; it does not apply where there is only one party plaintiff and one party defendant. *Walker Electrical Co. v. Walton*, 203 Ga. 246, 46 S.E.2d 184 (1948).

And distinct and separate claims of or against different persons may not be joined in the same action, but where there is one common right to be established by or against several, equity will determine the matter as to all parties in one action. *Lyle v. Keehn*, 195 Ga. 508, 24 S.E.2d 655 (1943).

Where there is no semblance of a conspiracy among the different defendants, and no common intent or act, this section affords no support for a multifarious petition. *Crutcher v. Crawford Land Co.*, 220 Ga. 298, 138 S.E.2d 580 (1964).

It is not necessary or requisite that all of the issues in the cases to be consolidated are identical; they need only be substantially the same. *O'Malley v. Wilson*, 182 Ga. 97, 185 S.E. 109 (1936).

And neither party offers timely objection, the order of the court constitutes a final consolidation, and not a temporary consolidation "for the trial." *O'Malley v. Wilson*, 182 Ga. 97, 185 S.E. 109 (1936).

If neither party in the cases to be consolidated offers timely objections to the consolidation, it must be assumed that the litigants consented thereto, and they are bound thereby. *O'Malley v. Wilson*, 182 Ga. 97, 185 S.E. 109 (1936).

This section does not include unnecessary and even improper parties. *Laken v. Sunbrand Supply Co.*, 214 Ga. 804, 108 S.E.2d 323 (1959).

Equity will do complete justice. — Equity, taking jurisdiction, will determine all of the matters in controversy and grant appropriate relief, equitable or legal, so as to do complete justice between the parties. *City of Atlanta v. Aycock*, 205 Ga. 441, 53 S.E.2d 744 (1949).

Cited in *Jefferson Banking Co. v. Trustees of Martin Inst.*, 146 Ga. 383, 91 S.E. 463 (1917); *McHenry v. McHenry*, 152 Ga. 105, 108 S.E. 522 (1921); *Hines v. Wilson*, 164 Ga. 888, 139 S.E. 802 (1927); *Jones v. Nisbet*, 165 Ga. 826, 142 S.E. 164 (1928); *O'Leary v. Costello*, 169 Ga. 754, 151 S.E. 487 (1930); *Burgess v. Ohio Nat'l Life Ins. Co.*, 177 Ga. 48, 169 S.E. 364 (1933); *Lightner v. Belk*, 178 Ga. 766, 174 S.E. 349 (1934); *Swann v. Wright*, 180 Ga. 323, 179 S.E. 86 (1935); *Tanner v. Wilson*,

183 Ga. App. 53, 187 S.E. 625 (1936); Cheatham v. Gormley, 85 Ga. App. 295, 190 S.E. 38 (1937); Ferrell v. Wight, 187 Ga. 360, 200 S.E. 271 (1938); Benton v. Turk, 188 Ga. 710, 4 S.E.2d 580 (1939); Kimsey v. Mickel, 191 Ga. 158, 12 S.E.2d 567 (1940); Roberts v. McBrayer, 194 Ga. 606, 22 S.E.2d 165 (1942); Arnold v. West Lumber Co., 198 Ga. 207, 31 S.E.2d 410 (1944); Harris v. Rowe, 200 Ga. 265, 36 S.E.2d 787 (1946); Godfrey v. City of Cochran, 208 Ga. 149, 65 S.E.2d 605 (1951); Salter v. Salter, 209 Ga. 90, 70 S.E.2d 453 (1952); Graves v. Wall, 210 Ga. 271, 79 S.E.2d 529 (1954); Worley v. Gaston, 210 Ga. 350, 80 S.E.2d 304 (1954); Kirchman v. Kirchman, 212 Ga. 488, 93 S.E.2d 685 (1956); Chambliss v. Kindred, 214 Ga. 712, 107 S.E.2d 205 (1959); Dawson v. Altamaha Land Co., 215 Ga. 700, 113 S.E.2d 129 (1960); Ayers v. Baker, 216 Ga. 132, 114 S.E.2d 847 (1960); Golfland, Inc. v. Thomas, 107 Ga. App. 563, 130 S.E.2d 757 (1963); Georgia Money Corp. v. Rissman, 220 Ga. 476, 139 S.E.2d 486 (1964); Logan v. Logan, 221 Ga. 769, 147 S.E.2d 326 (1966); McElmurray v. Richmond County, 223 Ga. 47, 153 S.E.2d 427 (1967); Roberts v. Roberts, 226 Ga. 203, 173 S.E.2d 675 (1970); State Farm Mut. Auto. Ins. Co. v. Hillhouse, 131 Ga. App. 524, 206 S.E.2d 627 (1974); Pugh v. Pou, 238 Ga. 450, 233 S.E.2d 198 (1977).

Proper Parties

All who have participated in an actionable wrongful act or procured it to be done are proper parties to litigation seeking relief therefrom. Hardin v. Homeyer, 213 Ga. 321, 99 S.E.2d 136 (1957).

All persons who are directly or consequentially interested in the event of the suit are properly made parties to a petition in equity, so as to prevent a multiplicity of suits by or against parties at once or successively affected by the original case. Herman v. Mobley, 172 Ga. 380, 158 S.E. 38 (1931); Benton v. Turk, 188 Ga. 710, 4 S.E.2d 580 (1939); Hyde v. Atlanta Woolen Mills Corp., 204 Ga. 450, 50 S.E.2d 52 (1948).

Where a principal and his surety join in the execution of a bond for faithful discharge of duty by the principal in relation

to funds about to be delivered to him as next friend for a minor, and the principal receives the fund, but thereafter conveys his realty to his wife for the purpose, known to the wife, of avoiding payment to the minor, and after breach of his bond judgment is obtained against his estate, and where the surety subsequently conveys his separate realty to his daughter with intent, known to the daughter, to avoid payment to the minor, in a suit against the surety, the widow of the principal and the daughter of the surety, to recover judgment for the amount due under the bond and to subject the properties conveyed by the principal and his surety respectively to payment of the judgments, the widow and daughter are proper parties defendant, and the petition is not subject to demurrer (now motion to dismiss) by the latter on the ground of multifariousness or of misjoinder of parties. Robertson v. Cox, 183 Ga. 744, 189 S.E. 844 (1937).

It is not required that in order to be a proper party one must be interested in all the matters and issues involved in the suit. Herman v. Mobley, 172 Ga. 380, 158 S.E. 38 (1931); Benton v. Turk, 188 Ga. 710, 4 S.E.2d 580 (1939); Evans v. Luce, 190 Ga. 403, 9 S.E.2d 646 (1940).

There is no misjoinder of parties or of causes of action, even if the petition concerns things of a different nature against several defendants whose rights are distinct, if it sets forth one connected interest among them all, centering in the point in issue in the case. Herman v. Mobley, 172 Ga. 380, 158 S.E. 38 (1931); City of Atlanta v. Aycock, 205 Ga. 441, 53 S.E.2d 744 (1949).

An equitable petition is not multifarious because all of the defendants are not interested in all of the matters contained in the suit; it is sufficient if each party has an interest in some matter in the suit which is common to all, and that they are connected with the others. Dobbs v. Federal Deposit Ins. Corp., 187 Ga. 569, 1 S.E.2d 672 (1939); Hyde v. Atlanta Woolen Mills Corp., 204 Ga. 450, 50 S.E.2d 52 (1948).

Where there is a common right, such as the right of partners to the partnership property, equity will take jurisdiction in order to avoid separate suits by or against each partner. Fowler v. Stansell, 221 Ga. 630, 146 S.E.2d 726 (1966).

For a party seeking to obtain possession of a disputed tract of land to join a third party assenting a superior claim to possession, it is not necessary that the interest of the parties be identical; the test is the common interest in the subject matter of the litigation, the property of which the plaintiff seeks to be put in possession, and the common interest of each of the defendants is to defeat that effort of the plaintiff and have possession for himself. *Voyles v. Federal Land Bank*, 182 Ga. 569, 186 S.E. 405 (1936).

Where petition asserted as to all defendants that the property conveyed to them by the principal defendant was without any legal consideration and purchased with funds stolen from the petitioner, the issue as to that question was common to all of the defendants, and the petition was not subject to the grounds of special demurrer (now motion to dismiss) as to misjoinder of parties and causes of action and multifariousness. *Hyde v. Atlanta Woolen Mills Corp.*, 204 Ga. 450, 50 S.E.2d 52 (1948).

Where the plaintiffs have a common interest against all of the defendants in a suit as to one or more of the questions raised by it, so as to make them all necessary parties for the purpose of enforcing that common interest, the circumstance of some of the defendants being subject to distinct liabilities in respect to different branches of the subject matter, will not render the bill multifarious. *Myers v. Grant*, 212 Ga. 677, 95 S.E.2d 9 (1956).

Under this rule, a few of the members of an unincorporated association, such as a trade union, may sue in the name or in behalf of all the members, where all by virtue of their membership have a common right or interest in the contract or other subject matter of the suit. The fact that the individual interests of the plaintiffs may in some respects differ, or that all do not have an interest in all the matters embraced in such an equitable suit, will not, as to individual plaintiffs, render the petition multifarious or subject to attack for misjoinder of parties or causes of action, if each of the plaintiffs has an essential interest common to all, with a common connection and right against the defendant. *O'Jay Spread Co. v. Hicks*, 185 Ga. 507,

195 S.E. 564 (1938).

A suit in equity, based on separate and distinct claims against different persons, where there is no common right to be established, will be dismissed on demurrer (now motion to dismiss) on the ground of multifariousness. *McCowan v. Snook*, 175 Ga. 430, 165 S.E. 84 (1932).

Where no common right or interest is shown, the alleged insolvency of the defendant in the petition for consolidation will not confer a right of consolidation in the plaintiffs. *Walker Elec. Co. v. Walton*, 201 Ga. 591, 40 S.E.2d 523 (1946).

The fact that the individual interests of the plaintiffs may in some respects differ, or that all do not have an interest in all the matters embraced in such an equitable suit, will not, as to individual plaintiffs, render the petition multifarious or subject to attack for misjoinder of parties or causes of action, if each of the plaintiffs has an essential interest common to all, with a common connection and right against the defendant. *City of Atlanta v. Aycock*, 205 Ga. 441, 53 S.E.2d 744 (1949).

The fact that two defendants are large stockholders in a company seeking to consolidate their cases does not give them such a common interest in the result of the litigation against the corporation as would authorize the consolidation of suits against each of them as individuals with suits against the corporation. *Walker Elec. Co. v. Walton*, 201 Ga. 591, 40 S.E.2d 523 (1946).

Petition seeking cancellation of a security deed and injunction against a sale under power contained therein, alleging that the debt which the deed was given to secure had been paid, brought by the administratrix of the estate of the grantor in the deed, a holder of a lien junior to the security deed, the owner of a one-half undivided interest in the lands therein conveyed, of whose interest the defendant grantee had notice at the time the deed was executed, was sufficient to set forth a cause of action for the relief prayed for as against a general demurrer (now subject to motion to dismiss), and was not demurrable (now motion to dismiss) on the ground of multifariousness, or of misjoinder of parties plaintiff, or that the interests of the plaintiffs were antagonistic and divergent as all the plaintiffs had an interest in the

realty, and a common interest in seeking to enjoin a sale thereof and cancellation of the deed thereto. *Perry v. Gormley*, 183 Ga. 757, 189 S.E. 850 (1937).

There is no misjoinder of causes of action or of parties plaintiff, and the petition is not multifarious, where the property rights of all the petitioners are affected by the defendants' attempt to condemn the plaintiff's property and by the acts of the defendants, who are alleged to be proceeding under a void Act of the General Assembly, and an unconstitutional, illegal, and void ordinance enacted by the defendant city pursuant to the powers purported to be conferred by the Act. *City of Atlanta v. Aycock*, 205 Ga. 441, 53 S.E.2d 744 (1949).

In view of the interest and general authority of a city to protect its streets and keep them free of obstructions, where separate acts of the railroad company and of the city have the effect to destroy an existing street as a continuous way, the railroad company and the city can be joined in one action for mandamus to compel each to remove the obstructions made by it. Such an action does not show a joinder of separate and distinct claims against different parties. *Atlantic C.L.R.R. v. Donalsonville Grain & Elevator Co.*, 184 Ga. 291, 191 S.E. 87 (1937).

Order of court consolidating suit by heirs at law, and suit by creditors, was not erroneous merely because of differences in the parties and in the relief sought, there being at least one matter common to both suits, in which all of the parties to each suit asserted interest, and a common relation of all contentions to the same estate. *Benton v. Turk*, 188 Ga. 710, 4 S.E.2d 580 (1939).

Jurisdiction Generally

Equitable jurisdiction requires common issue. — Before equity will assume jurisdiction to enjoin the bringing of multiple suits, the same issue must be involved in each of the suits. *Reed v. V.H. Kriegshaber & Son*, 171 Ga. 352, 155 S.E. 469 (1930).

Pleading and Practice

The general test, in determining whether cases can be consolidated or whether an equity suit will lie to enjoin an

action at law and try its issues in the equity suit, is whether the two suits could have been joined in one petition; and this depends on whether a misjoinder or multifariousness would result. *Sanders v. Wilson*, 193 Ga. 393, 18 S.E.2d 765 (1942).

A petition is multifarious when it embraces two or more claims by separate and distinct parties against separate and distinct parties, and where there is no common right to be established. *Saliba v. Saliba*, 202 Ga. 279, 42 S.E.2d 748 (1947); *Burgin Lumber Co. v. Kirksey*, 203 Ga. 439, 47 S.E.2d 68 (1948).

Where a petition should have been dismissed in the lower court for improper joinder and for multifariousness, the appellate court will not rule upon the merits of the several claims set forth in the petition, because it would be possible for a plaintiff to include in one action a multitude of disconnected claims against as many separate persons, and thus procure a decision upon the merits of each, and in effect avoid the rule against joining in one action separate claims against separate persons. *Burgin Lumber Co. v. Kirksey*, 203 Ga. 439, 47 S.E.2d 68 (1948).

Even though under this section equity might reach out and bring in as parties persons not already joined, it will not do so if a misjoinder or multifariousness would result. Such would be the result if separate claims with different issues would have to be determined. *Sanders v. Wilson*, 193 Ga. 393, 18 S.E.2d 765 (1942).

Where there are two actions at law, brought by separate plaintiffs, to recover damages *ex delicto*, in which neither party has a joint interest with the other, and a person who is a defendant in both actions at law seeks to convert one of them into an equitable suit on the sole ground of avoiding multiplicity, the rules against multifariousness are more strictly applied to deny the joinder. *Sanders v. Wilson*, 193 Ga. 393, 18 S.E.2d 765 (1942).

The issuance of an order of consolidation is a matter within the sound legal discretion of the judge, and the exercise of this discretion will not be disturbed, unless manifestly abused. *O'Malley v. Wilson*, 182 Ga. 97, 185 S.E. 109 (1936).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Equity, §§ 46-51, 248. 59 Am. Jur. 2d, Parties, §§ 3, 96.

C.J.S. — 1 C.J.S., Actions, § 107 et seq. 30 C.J.S., Equity, § 68. 31 C.J.S., Equity, § 133 et seq. 67A C.J.S., Parties, § 4.

ALR. — Joinder of parties or causes of action in suits under the Federal Employers' Liability Act, 13 ALR 159.

Right to enjoin enforcement of illegal tax, local assessment, or license fee, upon joinder of several affected thereby, 32 ALR 1266; 156 ALR 319.

Power of equity to enjoin prosecution of independent actions at law by different persons injured by the same tort, 75 ALR 1444.

Remaindermen as necessary or proper parties to action or proceeding between life tenant and trustee, 136 ALR 696.

Joinder or representation of several claimants in action against carrier or utility to recover overcharge, 1 ALR2d 160.

Appealability of state court order granting or denying consolidation, severance, or separate trials, 77 ALR3d 1082.

23-4-2. How extraordinary remedies claimed.

A claim for extraordinary relief or remedy to aid an action or defense may be asserted either by original pleading or by amendment. (Ga. L. 1887, p. 64, § 4; Civil Code 1895, § 4839; Civil Code 1910, § 5412; Code 1933, § 37-907.)

JUDICIAL DECISIONS

Purpose of section. — The purpose of this section is to vest in the superior court authority to settle in one suit a controversy between parties. *Clay v. Smith*, 207 Ga. 610, 63 S.E.2d 602 (1951).

A defendant who fails to set up a legal or equitable defense is bound thereby and cannot afterwards bring an equitable petition to enjoin his adversary. *McCall v. Fry*, 120 Ga. 661, 48 S.E. 200 (1904); *Graham v. Graham*, 137 Ga. 668, 74 S.E. 426 (1912); *Liberty Lumber Co. v. Enecks*, 23 Ga. App. 311, 98 S.E. 97 (1919).

Cited in *Biddle v. Papa*, 180 Ga. 468, 179 S.E. 357 (1935); *Hamilton v. First Nat'l Bank*, 180 Ga. 820, 180 S.E. 840 (1935); *Tanner v. Wilson*, 183 Ga. App. 53, 187

S.E. 625 (1936); *Winn v. Armour & Co.*, 184 Ga. 769, 193 S.E. 447 (1937); *Harrell v. Parker*, 186 Ga. 760, 198 S.E. 776 (1938); *Hicks v. Atlanta Trust Co.*, 187 Ga. 314, 200 S.E. 301 (1938); *Pardue Medicine Co. v. Pardue*, 194 Ga. 516, 22 S.E.2d 143 (1942); *Cohen v. Cohen*, 200 Ga. 33, 35 S.E.2d 908 (1945); *Hoxie v. Americus Auto. Co.*, 73 Ga. App. 686, 37 S.E.2d 808 (1946); *Parnell v. Wooten*, 202 Ga. 443, 43 S.E.2d 673 (1947); *Georgia Power Co. v. Mayor of Athens*, 206 Ga. 513, 57 S.E.2d 573 (1950); *Echols v. Thompson*, 210 Ga. 37, 77 S.E.2d 521 (1953); *Brown v. Granite Holding Corp.*, 221 Ga. 560, 146 S.E.2d 289 (1965).

RESEARCH REFERENCES

ALR. — By whom writ of assistance issued, 21 ALR 358.

23-4-3. Claim of legal and equitable relief by defendant.

A defendant to any action in the superior court, whether the action is for legal or equitable relief, may claim legal or equitable relief, or both, by framing proper pleadings for that purpose and sustaining them by sufficient evidence. (Ga. L. 1884-85, p. 36, § 2; Civil Code 1895, § 4837; Civil Code 1910, § 5410; Code 1933, § 37-905.)

JUDICIAL DECISIONS

Effect of suit in superior court. — When a plaintiff sues a defendant in the superior court, the policy of the law requires the controversy growing out of the cause of action alleged by the plaintiff to be settled in that suit. *Hamilton v. First Nat'l Bank*, 180 Ga. 820, 180 S.E. 840 (1935); *Brewer v. Williams*, 210 Ga. 341, 80 S.E.2d 190 (1954).

An ancillary petition may be filed after as well as before a decree to enable a court of equity to effectuate its own decree by ordering one put in possession of property where entitled thereto under its original decree, in order to avoid the further litigation of questions once settled between the same parties. *Voyles v. Federal Land Bank*, 182 Ga. 569, 186 S.E. 405 (1936).

After an ancillary petition seeking possession of property is filed, the court may, on application in a proper case, cause other parties to be made, where they are asserting some rights affecting the property and while a claimant in possession may not be subject to summary dispossession by the sheriff under the warrant sued out, the court of equity has authority, under its broad powers, to make the claimant a party in order to settle the rights of all parties in one action, without remitting the petitioner in the ancillary proceeding to a common-law action of ejectment. *Voyles v. Federal Land Bank*, 182 Ga. 569, 186 S.E. 405 (1936).

Claims arising ex contractu cannot be set off against claims arising ex delicto, except upon equitable grounds. *Brewer v.*

Williams, 210 Ga. 341, 80 S.E.2d 190 (1954).

Since plaintiffs' petition seeking to enjoin the defendant from the commission of an alleged tort in cutting and removing timber was not an action in tort or ex delicto, but an equitable proceeding, defendant was not only entitled but bound to set up all defenses that he had to the suit, either legal or equitable, and to pray for all relief needed in aid thereof, ordinary or extraordinary. *Brewer v. Williams*, 210 Ga. 341, 80 S.E.2d 190 (1954).

Cited in *Malsby v. Young*, 104 Ga. 205, 30 S.E. 854 (1898); *McCall v. Fry*, 120 Ga. 661, 48 S.E. 200 (1904); *Shorter v. Shorter*, 150 Ga. 109, 102 S.E. 863 (1920); *Kirkpatrick v. Coates*, 154 Ga. 643, 115 S.E. 103 (1922); *O'Leary v. Costello*, 169 Ga. 754, 151 S.E. 487 (1930); *Tanner v. Wilson*, 183 Ga. App. 53, 187 S.E. 625 (1936); *Winn v. Armour & Co.*, 184 Ga. 769, 193 S.E. 447 (1937); *Hicks v. Atlanta Trust Co.*, 187 Ga. 314, 200 S.E. 301 (1938); *Ellis v. Millen Hotel Co.*, 192 Ga. 66, 14 S.E.2d 565 (1941); *Georgia Power Co. v. Mayor of Athens*, 206 Ga. 513, 57 S.E.2d 573 (1950); *Earney v. Owen*, 213 Ga. 412, 99 S.E.2d 201 (1957); *Travelers Indem. Co. v. Callaway*, 215 Ga. 684, 113 S.E.2d 136 (1960); *Ogletree v. Cathrall*, 110 Ga. App. 100, 137 S.E.2d 799 (1964); *Georgia Money Corp. v. Rissman*, 220 Ga. 476, 139 S.E.2d 486 (1964); *Kiser v. Georgia Power Co.*, 126 Ga. App. 551, 191 S.E.2d 311 (1972).

RESEARCH REFERENCES

- Am. Jur. 2d.** — 27 Am. Jur. 2d, Equity, §§ 19, 194-210.
C.J.S. — 31 C.J.S., Equity, § 258 et seq.
ALR. — Inclusion in bill for divorce or annulment of allegations and prayer to impress trust upon property or otherwise settle property rights, 93 ALR 327.

23-4-4. Proceedings ex parte or in execution of protective powers; petition.

All ex parte proceedings or proceedings for the execution of the protective powers of equity over trust estates or the estates of wards of equity shall be initiated by presenting a petition to the court. The court may order such other proceedings as the necessity of each case demands. (Orig. Code 1863, § 4130; Code 1868, § 4162; Code 1873, § 4221; Code 1882, § 4221; Civil Code 1895, § 4863; Civil Code 1910, § 5436; Code 1933, § 37-1301.)

JUDICIAL DECISIONS

- Ex parte proceedings generally.** — Where the beneficiary of a trust has been adjudged incompetent, and is not capable of giving his valid consent to the conveyance of property which has been placed in trust for him prior to his becoming incompetent, and which may be conveyed by the trustee with his consent, a court of equity, in the exercise of its broad, comprehensive, and plenary jurisdiction of trusts and the estates of wards of chancery, may make the election for such incompetent, and authorize the trustee to convey the property. *Gilmore v. Gilmore*, 208 Ga. 245, 65 S.E.2d 813 (1951); *Rockefeller v. First Nat'l Bank*, 213 Ga. 493, 100 S.E.2d 279 (1957).
Cited in *Marshall v. Citizens & S. Nat'l Bank*, 54 Ga. App. 123, 187 S.E. 240 (1936); *Mize v. Harber*, 189 Ga. 737, 8 S.E.2d 1 (1940); *Humber v. Garrard*, 205 Ga. 357, 53 S.E.2d 748 (1949); *Rockefeller v. First Nat'l Bank*, 213 Ga. 493, 100 S.E.2d 279 (1957); *Rockefeller v. First Nat'l Bank*, 154 F. Supp. 122 (S.D. Ga. 1957); *Murphy v. Murphy*, 214 Ga. 602, 106 S.E.2d 280 (1958); *Weatherly v. Citizens & S. Nat'l Bank*, 222 Ga. 312, 149 S.E.2d 688 (1966).

RESEARCH REFERENCES

- ALR.** — Ex parte appointment of receiver for partnership, 169 ALR 1127.

23-4-5. Receipt of and action on petition; transmittal of proceedings to clerk.

The judge may receive and act upon the petitions described in Code Section 23-4-4 at chambers, always transmitting the entire proceedings to the clerk to be entered on the minutes or other records of the court. (Ga. L. 1853-54, p. 59, § 1; Code 1863, § 4131; Code 1868, § 4163; Code

1873, § 4222; Code 1882, § 4222; Civil Code 1895, § 4864; Civil Code 1910, § 5437; Code 1933, § 37-1302.)

JUDICIAL DECISIONS

Cited in *Brinkley v. Buchanan*, 55 Ga. 342 (1875); *Iverson v. Saulsbury Co.*, 68 Ga. 790 (1882); *Warren v. Bunch*, 80 Ga. 124, 7 S.E. 270 (1887); *Chapman v. Chattooga Oil Mill Co.*, 22 Ga. App. 446, 96 S.E. 579 (1918); *Mize v. Harber*, 189 Ga. 737, 8 S.E.2d 1 (1940); *Humber v. Garrard*, 205 Ga. 357, 53 S.E.2d 748 (1949).

ARTICLE 2

PARTIES

23-4-20. Who may complain in equity.

Any person who may not bring an action at law may complain in equity and every person who is remediless elsewhere may claim the protection and assistance of equity to enforce any right recognized by the law. (Orig. Code 1863, § 4090; Code 1868, § 4119; Code 1873, § 4178; Code 1882, § 4178; Civil Code 1895, § 4841; Civil Code 1910, § 5414; Code 1933, § 37-1001.)

JUDICIAL DECISIONS

History of section generally. — See *McHenry v. McHenry*, 152 Ga. 105, 108 S.E. 522 (1921).

Whoever has an interest in the decree sought should be made a party, if it is practicable. *Swift & Co. v. First Nat'l Bank*, 161 Ga. 543, 132 S.E. 99 (1926); *Waters v. Waters*, 167 Ga. 389, 145 S.E. 460 (1928).

Cited in *Henderson v. Napier*, 107 Ga. 342, 33 S.E. 433 (1899); *Railroad Comm'n*

v. Palmer Hdwe. Co., 124 Ga. 633, 53 S.E. 193 (1906); *Globe & Rutgers Fire Ins. Co. v. Salvation Army*, 177 Ga. 890, 172 S.E. 33 (1933); *Jackson v. Massachusetts Mut. Life Ins. Co.*, 183 Ga. 659, 189 S.E. 243 (1936); *Federal Land Bank v. Forrester*, 192 Ga. 446, 15 S.E.2d 517 (1941); *Lumbermens Mut. Cas. Co. v. Moody*, 116 Ga. App. 2, 156 S.E.2d 117 (1967).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Equity, §§ 120-123.

C.J.S. — 31 C.J.S., Equity, § 133 et seq.

ALR. — Constitutionality of statute conferring on chancery courts power to abate public nuisance, 22 ALR 542; 75 ALR 1298.

Equity jurisdiction for cancellation of insurance policy upon ground within incontestable clause prior to termination of period, 73 ALR 1529; 111 ALR 1275.

ARTICLE 3

DECREES

23-4-30. Nature of decree; signature and entry.

A decree is the judgment of the judge in equitable proceedings upon the facts ascertained and should be signed by him and entered on the minutes of the court. (Orig. Code 1863, § 4122; Code 1868, § 4153; Code 1873, § 4212; Code 1882, § 4212; Civil Code 1895, § 4851; Civil Code 1910, § 5424; Code 1933, § 37-1201.)

Cross references. — As to verdict and judgment generally, see Ch. 12, T. 9.

JUDICIAL DECISIONS

A decree is the judgment or sentence of a proceeding instituted in a court of equity. Loyd, Perryman & Mills v. Hicks, 31 Ga. 140 (1860).

A return by appraisers is not a decree because it is not "the judgment of the judge." Brackett v. Allison, 119 Ga. App. 632, 168 S.E.2d 611 (1969).

Decree should conform to the law. — When there is an error of law apparent on the face of the auditor's report, wholly irrespective of the evidence on which it is based, the judge in framing his decree should correct any error of law apparent on the face of the report, and make his decree conform to the law. Owen v. S.P. Richards Paper Co., 188 Ga. 258, 3 S.E.2d 660 (1939).

A decree must follow the verdict upon which it is founded; but this principle does not require that no decree be rendered unless the verdict contains all the facts upon which it is founded. A decree should follow the finding of facts found by a special verdict; but, while the judge in rendering the decree cannot go contrary to the facts found in a special verdict, he may examine the pleadings, admissions made by the parties, and all undisputed facts. In the absence of anything to the contrary, it will be presumed that the judge was autho-

rized by the pleadings, admissions made by the parties, or by the undisputed evidence, to enter the decree which he rendered. Gray v. Junction City Mfg. Co., 195 Ga. 33, 22 S.E.2d 847 (1942); Allen v. Allen, 198 Ga. 269, 31 S.E.2d 483 (1944).

In proceedings for equitable relief, it is the duty of the judge to submit such issues as will enable him to make a decree from the verdict, the pleadings and the undisputed facts. Allen v. Allen, 198 Ga. 269, 31 S.E.2d 483 (1944).

Only such questions need be put to the jury as will enable them fully to find the facts in issue and not admitted by the pleadings. Allen v. Allen, 198 Ga. 269, 31 S.E.2d 483 (1944).

The construction of an ambiguous decree made by the judge who granted it is conclusive. Baxter & Co. v. Camp, 129 Ga. 460, 59 S.E. 283 (1907).

Cited in Seay v. Treadwell, 43 Ga. 564 (1871); Webster v. Dundee Mtg. & Trust Co., 93 Ga. 278, 20 S.E. 310 (1893); Carstarphen v. Holt, 96 Ga. 703, 23 S.E. 904 (1895); Crosby v. Pittman, 129 Ga. 537, 59 S.E. 279, 121 Am. St. R. 234 (1907); Winn v. Walker, 147 Ga. 427, 94 S.E. 468 (1917); Holton v. Lankford, 189 Ga. 506, 6 S.E.2d 304 (1939); Peppers v. Peppers, 194 Ga. 10, 20 S.E.2d 409 (1942).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Equity, §§ 245-252.

C.J.S. — 31 C.J.S., Equity, § 581.

23-4-31. Power of court to mold and enforce decrees.

A superior court shall have full power to mold its decrees so as to meet the exigencies of each case and shall have full power to enforce its decrees when rendered. (Orig. Code 1863, § 4123; Code 1868, § 4154; Code 1873, § 4213; Code 1882, § 4213; Civil Code 1895, § 4853; Civil Code 1910, § 5426; Code 1933, § 37-1203.)

Law reviews. — For article comparing sections of the Georgia Civil Practice Act with preexisting provisions of the Georgia Code, see 3 Ga. St. B.J. 295 (1967).

JUDICIAL DECISIONS

A decree may be partly final and partly interlocutory; final as to its determination of all issues of law and fact, and interlocutory as to its mode of execution. *Johnson v. James*, 246 Ga. 680, 272 S.E.2d 692 (1980).

A final decree disposing of all the substantial equities of the case is not made interlocutory by the mere reservation of the right to direct the mode of its execution. *Johnson v. James*, 246 Ga. 680, 272 S.E.2d 692 (1980).

The judgment of the court should conform to the reasonable intendment of the verdict upon which it is based. *McGill v. McGill*, 247 Ga. 428, 276 S.E.2d 587 (1981).

The decree of a court of equity must in every case follow the verdict, and may not embrace questions which the verdict does not cover. *Burke v. Wilkins*, 49 Ga. 257 (1873); *Hall v. Huff*, 80 Ga. 31, 5 S.E. 49 (1887); *Gray v. Junction City Mfg. Co.*, 195 Ga. 33, 22 S.E.2d 847 (1942).

Decree may be molded to meet exigencies of the case, etc. — After a jury returns a general verdict finding a nuisance exists, the trial court is authorized under this section to mold its decree so as to meet the exigencies of the case and the prayers of the plaintiffs. *Tufts v. Dubignon*, 61 Ga. 322 (1878); *Parnell v. Wooten*, 202 Ga. 443, 43 S.E.2d 673 (1947); *City of Cordele v.*

Hobby, 240 Ga. 207, 240 S.E.2d 16 (1977); *Cotts v. Cotts*, 245 Ga. 138, 263 S.E.2d 163 (1980).

Manner of enforcement of decree is within discretion of judge. — In molding a decree upon the jury's verdict upon the facts, the chancellor (now judge) has a very broad discretion in determining what steps shall be taken to secure the enforcement of the rights awarded by the verdict, to the end that equity may afford adequate and complete relief, and this discretion will not in any case be controlled unless it is manifest there has been an abuse of discretion in a material matter. *Bank of Tupelo v. Collier*, 191 Ga. 852, 14 S.E.2d 59 (1941); *Bregman v. Rosenthal*, 212 Ga. 95, 90 S.E.2d 561 (1955).

Cited in *Wade v. Peacock*, 121 Ga. 816, 49 S.E. 826 (1905); *Swift & Co. v. First Nat'l Bank*, 161 Ga. 543, 132 S.E. 99 (1926); *Gore v. Humphries*, 163 Ga. 106, 135 S.E. 481 (1926); *Watters v. Southern Brighton Mills*, 168 Ga. 15, 147 S.E. 87 (1929); *Holst v. City of La Grange*, 175 Ga. 402, 165 S.E. 217 (1932); *Westberry v. Reddish*, 178 Ga. 116, 172 S.E. 10 (1933); *Jarecky v. Arnold*, 51 Ga. App. 954, 182 S.E. 66 (1935); *Kirk v. Bray*, 181 Ga. 814, 184 S.E. 733 (1935); *Snyder v. Elkan*, 187 Ga. 164, 199 S.E. 891 (1938); *Payne v. Home Sav. Bank*, 193 Ga. 406, 18 S.E.2d 770 (1942); *Hughes v. Cobb*,

195 Ga. 213, 23 S.E.2d 701 (1942); *Johnson v. Wilson*, 212 Ga. 264, 91 S.E.2d 758 (1956); *G.S. & M. Co. v. Dixon*, 220 Ga. 329, 138 S.E.2d 662 (1964); *Moon v. Moon*, 222 Ga. 650, 151 S.E.2d 714 (1966); *Bradley v. Bradley*, 233 Ga. 83, 210 S.E.2d

1 (1974); *Brown v. Techdata Corp.*, 238 Ga. 622, 234 S.E.2d 787 (1977); *Gorman v. Gorman*, 239 Ga. 312, 236 S.E.2d 652 (1977); *Golden v. Frazier*, 244 Ga. 685, 261 S.E.2d 703 (1979); *Holman v. Ruesken*, 246 Ga. 557, 272 S.E.2d 292 (1980).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Equity, § 251.

C.J.S. — 30 C.J.S., Equity, § 12. 31 C.J.S., Equity, § 612 et seq.

ALR. — Constitutionality of statute conferring on chancery courts power to

abate public nuisance, 22 ALR 542; 75 ALR 1298.

Power of equity to require acceptance of damages in lieu of injunctive relief asked, 105 ALR 1381.

23-4-32. Decree affecting property outside jurisdiction.

Equity may decree in cases of fraud, trust, or contract, although property not within the jurisdiction may be affected by the decree. (Civil Code 1895, § 4854; Civil Code 1910, § 5427; Code 1933, § 37-1204.)

History of section. — This section is derived from the decision in *Engel v. Scheuerman*, 40 Ga. 206 (1869).

JUDICIAL DECISIONS

Effect of decree affecting out-of-state property generally. — Petition charging that defendant husband was seeking to place his property where it could not be reached by his wife (his judgment creditor) presented a situation where upon proof a court of equity could grant prayers for setting aside alleged fraudulent conveyance and transfer to out-of-state resident, as well as alleged fraudulent claims of lien for attorneys' fees, and for appointment of a receiver to take charge of defendant's assets and under the direction of the court sell enough to pay the petitioner the amount now due under her two judgments. *Peoples Loan Co. v. Allen*, 199 Ga. 537, 34 S.E.2d 811 (1945).

Petition brought against a judgment debtor and other defendants, alleging that they entered into a conspiracy in bad faith to hinder, delay, or defraud the petitioner in the collection of her two judgments, and that in pursuance of such conspiracy var-

ious properties of the judgment debtor were secreted and fraudulent conveyances were made, with the result that the property of the judgment debtor in this state not so concealed or conveyed was insufficient to discharge the amount due under the two judgments, and seeking to set aside such fraudulent conveyances and the appointment of a receiver and other relief, stated a cause of action against the four defendants. *Peoples Loan Co. v. Allen*, 199 Ga. 537, 34 S.E.2d 811 (1945).

When a case is a proper one in other respects for equitable relief independent of statute, an obligation can be enforced wherever defendant is personally within the jurisdiction of the court, although land lying in another state may be affected by the decree and in such cases the court does not act upon the land, or make any order in reference to it; it simply declares a certain transaction relating to the land fraudulent, as between the complainant and the

offending parties, and thus removes it as an obstruction to the creditor's legal remedy. *Dodd v. Bell*, 180 Ga. 313, 178 S.E. 663 (1935).

When a court of equity has jurisdiction of the person of a defendant, it may decree the specific performance of a contract for the conveyance of land situated in a foreign state or country, and also restrain a defen-

dant by injunction in certain specified cases, by acting upon the person of the defendant within its jurisdiction. *Dodd v. Bell*, 180 Ga. 313, 178 S.E. 663 (1935).

Cited in *Georgia S. & F.R.R. v. Mercantile Trust & Deposit Co.*, 94 Ga. 306, 21 S.E. 701, 47 Am. St. R. 153, 32 L.R.A. 208 (1894).

RESEARCH REFERENCES

ALR. — Decree in suit by judgment creditor to set aside conveyance in fraud of creditors as bar to another suit for same purpose in respect of another conveyance, 108 ALR 699.

Consent decree as affecting title to real

estate in another state, 2 ALR2d 1188.

Jurisdiction of suit involving trust as affected by location of res, residence of parties to trust, service, and appearance, 15 ALR2d 610.

23-4-33. Decree in will or contract matters; consent of guardian or guardian ad litem.

When it becomes impossible to carry out any last will and testament in whole or in part, and in all matters of contract, the judges of the superior courts shall have power to render any decree that may be necessary and legal, provided that all parties in interest shall consent thereto in writing and there shall be no issue as to the facts or, if there is such an issue, that there shall be a like consent in writing that the judge presiding may hear and determine such facts, subject to a review by the Supreme Court, as in other cases. In all cases where minors are interested, the consent of the guardian at law or the guardian ad litem shall be obtained before the decree is rendered. (Ga. L. 1865-66, p. 221, § 1; Code 1868, § 4155; Code 1873, § 4214; Code 1882, § 4214; Ga. L. 1882-83, p. 69, § 1; Civil Code 1895, § 4855; Civil Code 1910, § 5428; Code 1933, § 37-1205.)

JUDICIAL DECISIONS

By virtue of this section, the judge determines the question of impossibility of carrying out a will. *Sharp v. Findley*, 71 Ga. 654 (1883).

Cited in *Summerour v. Fortson*, 174 Ga.

862, 164 S.E. 809 (1932); *Sims v. Ramsey*, 186 Ga. 732, 198 S.E. 770 (1938); *Holton v. Lankford*, 189 Ga. 506, 6 S.E.2d 304 (1939).

RESEARCH REFERENCES

C.J.S. — 31 C.J.S., Equity, § 588.

23-4-34. Interlocutory decrees and orders.

At any stage in the progress of an action seeking equitable relief, if any portion of the same is ready for or requires a decree, the court may hear and determine such matters and pass such interlocutory decree or order as may advance the cause and expedite a final hearing. If no issue of fact is involved, the verdict of a jury shall be unnecessary. (Orig. Code 1863, § 4111; Code 1868, § 4142; Code 1873, § 4201; Code 1882, § 4201; Civil Code 1895, § 4847; Civil Code 1910, § 5420; Code 1933, § 37-1101.)

Cross references. — As to special verdicts in civil cases, see § 9-11-49.

Law reviews. — For article, "Injunction Procedure in Georgia," see 13 Ga. B.J. 300 (1951). For article surveying development

of equity and the right to trial by jury in equity actions in Georgia, and advocating use of jury to try issues of fact in equitable actions, see 8 Mercer L. Rev. 225 (1957).

JUDICIAL DECISIONS

A decree may be partly final and partly interlocutory; final as to its determination of all issues of law and fact and interlocutory as to its mode of execution. *Moody v. Muscogee Mfg. Co.*, 134 Ga. 721, 68 S.E. 604, 20 Ann. Cas. 301 (1910); *Johnson v. James*, 246 Ga. 680, 272 S.E.2d 692 (1980).

A final decree disposing of all the substantial equities of the case is not made interlocutory by reservation of the right to direct the mode of its execution. *Moody v. Muscogee Mfg. Co.*, 134 Ga. 721, 68 S.E. 604, 20 Ann. Cas. 301 (1910); *Johnson v. James*, 246 Ga. 680, 272 S.E.2d 692 (1980).

Control of interlocutory decree. — An interlocutory decree is under the control of the judge until the final hearing. *Howard v. Lowell Mach. Co.*, 75 Ga. 325 (1885).

Reopening decree. — An interlocutory decree fixing the plan of settlement to creditors, on a petition to wind up affairs of a building and loan association may be made with an order therein that it may be reopened for adjudication of rights and liabilities of subsequent parties. *Goodrich v. City Loan & Bldg. Ass'n*, 54 Ga. 98 (1875).

The judges' powers in this state are similar to those as were exercised in England. *Jones v. Dougherty*, 10 Ga. 273 (1851).

Correction of error in auditor's conclusion of law on facts as found is competent by decree. *Wiley v. City of Sparta*, 154 Ga. 1, 114 S.E. 45; 116 S.E. 116, 25 A.L.R. 1342 (1922).

Order violative of rights of creditors. — The minor legatees under a will, who are not the children of the testator, have no right in a case pending in superior court upon a petition filed by the executor, for direction to an interlocutory order setting apart money for their support, when the solvency of the estate was denied. *Williams v. Mobley*, 38 Ga. 241 (1868).

Interlocutory judgment conflicting with prior order. — Where the court enjoins the defendant from disposing of property except by the approval of court, at an interlocutory hearing to secure the appointment of a receiver and to impress a trust on said property, it is error under this section for the court by a subsequent interlocutory judgment to order the defendant to deliver the property to plaintiff before an adjudication of the issue of the

ownership of the property. *James v. Park*, 145 Ga. 356, 89 S.E. 416 (1916).

Apprehension of enforcement of municipal charter not ground for interlocutory injunction. — Where action is filed in a superior court, seeking to enjoin the enforcement of a provision of a municipal charter on the ground that such provision is unconstitutional, and where it appears that no arrest has been made, no property levied upon, and no other interference with the person or the property rights of the petitioner, but that the petition is based upon a mere apprehension that such may be done by the municipality, it is proper to refuse an interlocutory injunction. *Southern Oil Stores, Inc. v. City of Atlanta*, 177 Ga. 602, 170 S.E. 801 (1933).

The decree of a court of equity must follow the verdict, and may not embrace questions which the verdict does not cover. *Gray v. Junction City Mfg. Co.*, 195 Ga. 33, 22 S.E.2d 847 (1942).

Trial by jury in an equity case is generally a matter of right under the law of this state. It is true the right does not exist under the Constitution as common-law cases, but it is as clearly provided by statutes

applicable generally to cases in equity. *Holton v. Lankford*, 189 Ga. 506, 6 S.E.2d 304 (1939).

It was error for the court to dismiss the plaintiffs' amended petition at an interlocutory hearing for temporary injunction, on the ground that the evidence was insufficient to authorize the grant of such preliminary relief. Because the allegations of the petition, as amended, if true, made a case entitling them to injunction, and whether an interlocutory injunction should or should not have been granted by the trial judge under the facts presented, the plaintiffs still had a right to have a hearing before a jury with a view of determining whether or not a permanent injunction should be granted. *Jones v. Mauldin*, 208 Ga. 14, 64 S.E.2d 452 (1951).

Cited in *Bearden v. Longino*, 183 Ga. 819, 190 S.E. 12 (1937); *Manry v. Stephens*, 190 Ga. 305, 9 S.E.2d 58 (1940); *Gibson v. Gibson*, 204 Ga. 437, 49 S.E.2d 877 (1948); *Hartley v. Hartley*, 211 Ga. 616, 87 S.E.2d 851 (1955); *Shaw v. Miller*, 215 Ga. 413, 110 S.E.2d 759 (1959); *Jonesboro Inv. Trust Ass'n v. Donnelly*, 141 Ga. App. 780, 234 S.E.2d 349 (1977).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Equity, § 240.

C.J.S. — 31 C.J.S., Equity, §§ 510, 580 et seq.

ALR. — Divorce: right to enter final decree after time fixed by interlocutory decree expires, 1 ALR 1591; 104 ALR 654.

Equity jurisdiction for cancellation of insurance policy upon ground within incontestable clause prior to termination of

period, 73 ALR 1529; 111 ALR 1275.

Effect of failure of special verdict or special finding to include findings of all ultimate facts or issues, 76 ALR 1137.

Effect of nonsuit, dismissal, or discontinuance of action on previous orders, 11 ALR2d 1407.

Withdrawal of written special interrogatories or special questions submitted to jury, 91 ALR2d 776.

23-4-35. Confirmation of sales under decrees.

Sales under decrees in equity shall be subject to confirmation by the judge, who has a large discretion vested in him in reference thereto. Such sales shall not be consummated until confirmed by him. (Civil Code 1895, § 4856; Civil Code 1910, § 5429; Code 1933, § 37-1206.)

History of section. — This section is derived from the decisions in *Walter v. Hargrove*, 61 Ga. 267 (1878) and *Holmes v. Harris*, 70 Ga. 309 (1883).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
 CONFIRMATION GENERALLY
 JUDICIAL DISCRETION
 PLEADING AND PRACTICE

General Consideration

Cited in *Wingfield v. Bennett*, 36 Ga. App. 27, 134 S.E. 840 (1926); *Dockery v. Parks*, 117 Ga. App. 589, 161 S.E.2d 406 (1968); *Dockery v. Parks*, 224 Ga. 369, 162 S.E.2d 332 (1968); *Brannon v. Simpson*, 244 Ga. 58, 257 S.E.2d 541 (1979).

Confirmation Generally

Judgment rendered upon a jury verdict finding a sale valid is sufficient confirmation to meet the requirements of this section. *Palmour v. Roper*, 119 Ga. 10, 45 S.E. 790 (1903).

Judicial Discretion

Judge vested with discretion as to confirmation of sales. — The discretion of the judge is a sound legal discretion and he cannot arbitrarily withhold his confirmation of a sale made under decree of the court. *Pledger v. Bank of Lyerly*, 157 Ga. 229, 121 S.E. 228 (1924).

Abuse of discretion generally. — Where, in a suit to enjoin an exercise of a power of sale contained in a security deed, the sale was allowed to proceed subject to

confirmation by the court, and on the question of confirmation, subsequently arising, the existence of the facts alleged as grounds of objection was the sole issue presented, and such issue was a matter of dispute under the evidence, the judge did not abuse his discretion in decreeing confirmation. *Wilson v. Trustees of Union Theological Sem.*, 181 Ga. 755, 184 S.E. 290 (1936).

A confirmation of a sale when there is a variance between the advertisement and the terms of the order of sale constitutes error. *Slaughter v. Strother*, 99 Ga. 633, 27 S.E. 764 (1896).

Pleading and Practice

After a judicial sale has been confirmed, the court has no discretion to rescind it except upon some special ground, such as fraud, accident, or mistake, which has worked an injustice, and which was unknown to the complaining party at the time of confirmation. *Hurt Bldg., Inc. v. Atlanta Trust Co.*, 181 Ga. 274, 182 S.E. 187 (1935).

RESEARCH REFERENCES

ALR. — Doctrine of equitable conversion as affected by discretion as to time, manner or other circumstances of

sale, where the duty to sell is mandatory, 124 ALR 1448.

23-4-36. Decree transferable; lien.

A decree shall be transferable like other judgments and, when for money, shall constitute a like lien. (Orig. Code 1863, § 4126; Code 1868, § 4158; Code 1873, § 4217; Code 1882, § 4217; Civil Code 1895, § 4859; Civil Code 1910, § 5432; Code 1933, § 37-1209.)

JUDICIAL DECISIONS

A decree is of equal force with a judgment. Dean v. Central Cotton Press Co., 64 Ga. 670 (1880).

RESEARCH REFERENCES

ALR. — Remedy for enforcement of judgment lien after death of judgment debtor, 114 ALR 1165.

23-4-37. Attachments for contempt; executions against property.

Every decree or order of a superior court in equitable proceedings may be enforced by attachment against the person for contempt. Decrees for money may be enforced by execution against the property. If a decree is partly for money and partly for the performance of a duty, the former may be enforced by execution and the latter by attachment or other process. (Orig. Code 1863, §§ 3032, 4125; Code 1868, §§ 3044, 4157; Code 1873, §§ 3099, 4216; Code 1882, §§ 3099, 4216; Civil Code 1895, §§ 3944, 4858; Civil Code 1910, §§ 4541, 5431; Code 1933, §§ 37-123, 37-1208.)

JUDICIAL DECISIONS

Every decree or order of a court may be enforced by attachment for contempt. Williams v. Lampkin & Co., 53 Ga. 200 (1874).

Contempt citation as branch of original equity case. — Where a proper citation for contempt is brought by the plaintiff in the original equity suit, it may be considered as a branch of the equity case and tried accordingly. Alfred v. Celanese Corp. of America, 205 Ga. 371, 54 S.E.2d 240 (1949).

The respondent in a citation for contempt is entitled to be apprised of the acts

which he is charged with committing in violation of the injunctive order, so that he may be prepared to defend against such allegations on the hearing. Hortman v. Georgia Bd. of Dental Exmrs., 214 Ga. 560, 105 S.E.2d 732 (1958).

There is no requirement of law that a contempt petition be verified. Gore v. Gore, 217 Ga. 478, 123 S.E.2d 254 (1961).

A petition seeking to have a husband held in contempt of court for failure to pay alimony need not be verified. Brown v. Olen, 226 Ga. 492, 175 S.E.2d 838 (1970).

Injunction. — Injunction is distinctly an equitable remedy, and a court of equity acts in personam, not in rem. It is relief which may be enforced by the court granting it by attachment against the party refusing to obey the mandates of the decree. *Howard v. Warren*, 206 Ga. 838, 59 S.E.2d 503 (1950).

Where an order of court forbidding the use of threats, violence, and intimidation for the purpose of preventing others from engaging in their employment during a labor strike is violated, the violator can find no protection under the constitutional

guaranty of free speech. *Lassiter v. Swift & Co.*, 204 Ga. 561, 50 S.E.2d 359 (1948).

Cited in *Howard v. Durand*, 36 Ga. 346, 91 Am. Dec. 767 (1867); *Clements v. Tillman*, 79 Ga. 451, 5 S.E. 194, 11 Am. St. R. 491 (1887); *Robbins v. Kinman*, 177 Ga. 46, 169 S.E. 304 (1933); *Bank of Tupelo v. Collier*, 191 Ga. 852, 14 S.E.2d 50 (1941); *Poss v. Norris*, 197 Ga. 513, 29 S.E.2d 705 (1944); *Person v. George*, 211 Ga. 18, 83 S.E.2d 593 (1954); *Henderson v. State Bd. of Exmrs. in Optometry*, 221 Ga. 536, 145 S.E.2d 559 (1965).

RESEARCH REFERENCES

C.J.S. — 30 C.J.S., Equity, § 27. 31 C.J.S., Equity, § 612.

ALR. — Jurisdiction, and propriety of its exercise, to require real property in another state or country to be applied in satisfaction of debt (including the setting aside of a fraudulent conveyance thereof),

144 ALR 646.

Attachment statute as applicable to equity suits, 154 ALR 95.

Power of equity court to reach or to sequester, for seizure and sale, beneficial equitable interests in corporate stock shares, 42 ALR2d 920.

23-4-38. Enforcement of extraordinary remedies.

Injunction, ne exeat, prohibition, and other extraordinary remedies may be enforced by attachment for contempt. (Orig. Code 1863, §§ 3157, 4127; Code 1868, §§ 3169, 4159; Code 1873, §§ 3237, 4218; Code 1882, §§ 3237, 4218; Civil Code 1895, §§ 4860, 4899; Civil Code 1910, §§ 5433, 5474; Code 1933, § 37-1210.)

JUDICIAL DECISIONS

Injunction is distinctly an equitable remedy, and a court of equity acts in personam, not in rem. It is relief which may be enforced by the court granting it by attachment against the party refusing to obey the mandates of the decree. *Howard v. Warren*, 206 Ga. 838, 59 S.E.2d 503 (1950).

The respondent in a citation for contempt is entitled to be apprised of the acts

which he is charged with committing in violation of the injunctive order, so that he may be prepared to defend against such allegations on the hearing. *Hortman v. Georgia Bd. of Dental Exmrs.*, 214 Ga. 560, 105 S.E.2d 732 (1958).

Cited in *Isaac Silver & Bros. Co. v. Kalmon*, 175 Ga. 244, 165 S.E. 434 (1932); *Alred v. Celanese Corp. of America*, 205 Ga. 371, 54 S.E.2d 240 (1949).

Index to Titles 22, 23

A

ACCIDENT AND MISTAKE.

Equitable relief, §§23-2-20 to 23-2-34.
See EQUITY.

ACCOUNTS AND ACCOUNTING.

Equity.

Petition for accounting.
Offer to pay balance unnecessary,
§23-2-75.
Scope of equity jurisdiction,
§23-2-70.
Writ of ne exeat.
Scope of equity jurisdiction,
§23-2-70.

ACTIONS.

Equity.

Compulsion to litigate, §23-1-21.
Consolidation of actions, §23-4-1.
How equitable relief claimed in civil
action, §23-3-2.
Multiplicity of actions.
Scope of equity jurisdiction over
matters of account, §23-2-70.
Pending actions.
Effect on purchasers, §23-1-18.
Notice, §23-1-18.

ADVERTISING.

Eminent domain.

Proceedings before special master.
Newspaper advertisement as to
original location of highway,
§22-2-109.
Proceedings before superior court.
Newspaper advertisement as to
original location of highway,
§22-2-137.

AGENTS.

Equity.

Accident and mistake.
Mistake of law in instrument,
§23-2-23.

APPEALS.

Eminent domain.

Awards.
Proceedings before special master.
Appeal of award generally,
§22-2-112.

APPEALS—Cont'd

Eminent domain—Cont'd

Flood roads and highways.
Appeal to superior court, §22-3-44.
Proceedings before special master.
Right of owners of separate and
distinct parcels to file separate
appeal, §22-2-113.
Tender, payment or acceptance of
award.
Effect on right of appeal,
§22-2-113.

ASSESSORS.

Proceedings before assessors.

See EMINENT DOMAIN.

ASSETS.

Decedents' estates.

Equity.
When equity will interfere with
administration of estates,
§23-2-91.

Equity.

See EQUITY.

ATTACHMENTS.

Equity.

Enforcement of judgments, §23-4-37.

ATTORNEYS AT LAW.

Equity.

Interpleader.
Attorney's fees, §23-3-90.

Fees.

Interpleader.
Equitable interpleader, §23-3-90.

AWARDS.

Eminent domain.

Proceedings before assessors.
Appeals.
Payment, tender, etc., of award
as condition on condemnor's
right to use property or
interest, §22-2-81.
Discrepancy between award and
final judgment, §22-2-82.
Entry of award on minutes of
court, §22-2-84.
Execution on award, §22-2-83.

AWARDS—Cont'd

Eminent domain—Cont'd

Proceedings before assessors—Cont'd
Filing and recording award,
§22-2-65.

Proceedings before special master.

Appeal of award, §22-2-112.

Effect of tender, payment or
acceptance on right of
appeal, §22-2-113.

Award by special master and
judgment of court conclusive
as to right of condemnor to
take or damage property,
§22-2-107.

Deposit of award into court
registry, §22-2-114.

Discrepancy between award of
special master and verdict of
jury, §22-2-113.

Execution of award, §22-2-113.

Form of award, §22-2-110.

Incorporation of award into
judgment of court, §22-2-111.

Part of record of proceedings,
§22-2-110.

Time of filing, §22-2-110.

Use in subsequent appeals,
§22-2-110.

Vesting of title upon deposit into
court, §22-2-110.

Proceedings before superior courts.

Appeal from assessors' award,
§22-2-136.

Disposition of award by court,
§22-2-138.

Filing and recording of award,
§22-2-141.

Molding of award or verdict,
§22-2-138.

Power of court to adjudge
condemnation of title upon
deposit of award into court,
§22-2-138.

Scope of award or verdict,
§22-2-138.

Equity.

Fraud.

Relief against awards, §23-2-60.

B

BEACONS.

Construction by United States.

Eminent domain, §§22-3-120 to
22-3-122.

See EMINENT DOMAIN.

BONA FIDE PURCHASERS.

Equity.

Interference with, §23-1-20.

Powers of appointment.

Release, relinquishment or
covenant.

When bona fide purchasers
affected, §23-2-119.

BOND ISSUES.

Equity.

Payment of lost bonds or notes,
§23-2-3.

BONDS, SURETY.

Equity.

Ne exeat.

Defendant's bond, §23-3-23.

Judge's discretion, §23-3-22.

C

CLERKS OF COURT.

Equity.

Ex parte proceedings.

Transmittal of proceedings to
clerk, §23-4-5.

Proceedings in execution of
protective powers.

Transmittal of proceedings to
clerk, §23-4-5.

**CONSTRUCTION AND
INTERPRETATION.**

Equity.

Construction of conditions, §23-1-23.

Quia timet against all the world.

Liberal construction, §23-3-71.

Wills.

Equity.

Application for direction or
construction of will, §23-2-92.

CONTEMPT.

Equity.

Enforcement of decree or order,
§23-4-37.

CONTRACTS.

Consideration.

Equity.

Setting aside contract for
inadequate consideration,
§23-2-2.

Equity.

Accounts growing out of privity of
contract.

Scope of equity jurisdiction,
§23-2-70.

Apportionment of contracts.

Proper subject of equitable
jurisdiction, §23-2-72.

Decrees, §23-4-33.

Disparities in mental ability, §23-2-2.

Inadequate consideration.

Setting aside sale or contract,
§23-2-2.

Reformation and execution of
contract distinguished, §23-2-30.

Rent or hire.

Apportionment of contract,
§23-2-72.

Rescission.

Unilateral mistake of fact,
§23-2-31.

Volunteer's equity inferior, §23-1-13.

Mental abilities.

Equity may set aside contract when
great disparity of mental ability
in contracting for bargain,
§23-2-2.

Parol contracts.

Real property.

Specific performance.

When remedy decreed,
§23-2-131.

Price.

Specific performance.

Refusal of decree for inadequacy
of price, §23-2-133.

Reformation.

Accident and mistake.

Reformation and execution in case
of mistake distinguished,
§23-2-30.

Voluntary agreements.

When enforced, §23-2-132.

CONTRIBUTIONS.

Equity.

Entitlement to contribution,
§23-2-71.

CONVEYANCES.

Equity.

Accident and mistake.

Form of conveyance contrary to
intent, §23-2-25.

Fraud.

Annulment for fraud, §23-2-60.

COSTS.

Equity.

Quia timet, §23-3-41.

COUNTIES.

Eminent domain.

Flood roads and highways.

Authorization of officers to act for
county, §22-3-43.

Watershed and flood control
projects.

Authority of county to exercise
power, §22-3-100.

D

DAMAGES.

Equity.

Specific performance.

Damages when specific
performance impossible,
§23-2-135.

DAMS.

Eminent domain.

Electric power plants.

Condemnation of dams, §22-3-22.

DEBTORS AND CREDITORS.

Equity.

Administration of assets.

Application of joint and individual
assets to debts, §23-2-98.

Application of joint and individual
assets to debts, §23-2-98.

Creditors' petitions, §23-2-95.

Interference with creditors, §23-1-22.

When equitable assets may be
reached by creditor, §23-2-96.

DECEDENTS' ESTATES.

Assets.

Equity.

When equity will interfere with
administration of estates,
§23-2-91.

Equity.

Marshaling assets, §23-2-93.

DECEDENTS' ESTATES—Cont'd

Equity—Cont'd

When equity will interfere with
administration of estates,
§23-2-91.

DEFINITIONS.

Eminent domain.

See EMINENT DOMAIN.

Equity.

See EQUITY.

DEPOSITS.

Eminent domain.

Proceedings before special master.

Deposit of award into court
registry.

Conflicting claims as to deposit,
§22-2-114.

DOCKETS.

Equity.

Quia timet against all the world.

Filing in lis pendens docket,
§23-3-62.

E

**ELECTION OF RIGHTS AND
REMEDIES.**

Equity.

When compelled, §23-1-24.

ELECTRICITY.

Eminent domain.

Construction of electric power plants,
§§22-3-20 to 22-3-22.

See EMINENT DOMAIN.

EMINENT DOMAIN.

Advertising.

Proceedings before special master.

Newspaper advertisement as to
original location of highway,
§22-2-109.

Proceedings before superior court.

Newspaper advertisement as to
original location of highway,
§22-2-137.

Appeals.

Awards.

Proceedings before special master.

Appeal of award generally,
§22-2-112.

Flood roads and highways.

Appeal to superior court, §22-3-44.

Proceedings before assessors. See
within this heading, "Assessors."

EMINENT DOMAIN—Cont'd

Appeals—Cont'd

Proceedings before special master.

Right of owners of separate and
distinct parcels to file separate
appeal, §22-2-113.

Tender, payment or acceptance of
award.

Effect on right of appeal,
§22-2-113.

Assessors.

Appeals.

Award.

Discrepancy between award and
final judgment, §22-2-82.

Effect of tender, payment, etc.,
on right of appeal, §22-2-82.

Entry of notice and award on
court minutes, §22-2-84.

Execution on award, §22-2-83.

Payment as condition on
condemnor's right to use
property or interest,
§22-2-81.

Costs.

Payment, §22-2-84.

Effect of appeal on condemnor's
right to use condemned
property or interest, §22-2-81.

Execution on award or judgment.

Issuance, §22-2-83.

Payments to assessors by
condemnor, §22-2-84.

State.

Exemption from operation of
code section, §22-2-84.

Superior court.

Appeal to jury, §22-2-80.

Awards.

Appeals. See within this
subheading, "Appeals."

Filing, §22-2-65.

Manner of payment where owner
minor or under disability,
§22-2-86.

Recording, §22-2-65.

Compelling attendance.

Power of assessors, §22-2-61.

Condemnor.

Defined, §22-2-1.

Entry of findings, §22-2-64.

Evidence to be heard generally,
§22-2-62.

Extent of interest obtainable by
condemnor upon condemnation,
§22-2-85.

EMINENT DOMAIN—Cont'd

Assessors—Cont'd

Findings.

Entry, §22-2-64.

Hearings, §§22-2-60 to 22-2-65.

Manner of assessment, §22-2-63.

Notice of condemnation.

Condemnor.

Return of surplus award to
condemnor, §22-2-24.

Contents of notice, §22-2-26.

Direction of notice where owner
minor or under disability,
§22-2-21.

Disabled persons.

Direction of notice where owner
under disability, §22-2-21.

Guardian ad litem.

Appointment where owner
minor or under disability,
§22-2-21.

Manner and time of service,
§22-2-25.

Minors.

Direction of notice where owner
minor, §22-2-21.

Nonresidents.

Addresses unknown.

Representation by judge of
probate court, §22-2-23.

Direction of notice, §22-2-23.

Representation by judge of
probate court, §22-2-23.

Persons entitled to receive notice,
§22-2-20.

Remaindermen serving notice,
§22-2-22.

Second assessment.

Right of owner to second
assessment upon
appearance, §22-2-24.

Trustees of trust property.

Serving notice, §22-2-22.

Unknown owners.

Direction of notice, §22-2-24.

Notice of hearing, §22-2-60.

Oaths, §22-2-43.

Parties.

Notification, §22-2-60.

Right to be represented, §22-2-61.

Selection, §22-2-40.

Clerk of superior court, §22-2-41.

Failure of parties' nominees to
select third assessor, §22-2-42.

EMINENT DOMAIN—Cont'd

Assessors—Cont'd

Selection—Cont'd

Judge of probate court where
owners or representatives fail
to select assessor, §22-2-41.

Right of owners in selecting
assessor, §22-2-41.

Unknown owners, §22-2-41.

Subpoenas.

Power of assessors, §22-2-61.

Superior court.

Appointment by superior court,
§22-2-135.

Valuation of property.

Manner of assessment, §22-2-63.

Awards.

Proceedings before assessors.

Appeals.

Payment, tender, etc., of award
as condition on condemnor's
right to use property or
interest, §22-2-81.

Discrepancy between award and
final judgment, §22-2-82.

Entry of award on minutes of
court, §22-2-84.

Execution on award, §22-2-83.

Filing and recording award,
§22-2-65.

Proceedings before special master.

Appeal of award, §22-2-112.

Effect of tender, payment or
acceptance on right of
appeal, §22-2-113.

Award by special master and
judgment of court conclusive
as to right of condemnor to
take or damage property,
§22-2-107.

Deposit of award into court
registry, §22-2-114.

Discrepancy between award of
special master and verdict of
jury, §22-2-113.

Execution of award, §22-2-113.

Form of award, §22-2-110.

Incorporation of award into
judgment of court, §22-2-111.

Part of record of proceedings,
§22-2-110.

Time of filing, §22-2-110.

Use in subsequent appeals,
§22-2-110.

EMINENT DOMAIN—Cont'd

Awards—Cont'd

Proceedings before special master

—Cont'd

Vesting of title upon deposit into court, §22-2-110.

Proceedings before superior court.

Appeal from assessors' award, §22-2-136.

Disposition of award by court, §22-2-138.

Filing and recording of award, §22-2-141.

Molding of award or verdict, §22-2-138.

Power of court to adjudge condemnation of title upon deposit of award into court, §22-2-138.

Scope of award or verdict, §22-2-138.

Beacons. See within this heading, "Lighthouses and beacons."

Condemnor.

Defined, §22-2-1.

Return of surplus award, §22-2-24.

Counties.

Flood roads and highways.

Authorization of officers to act for county, §22-3-43.

Watershed and flood control projects.

Authority of county to exercise power, §22-3-100.

Courts.

Duty as to laws authorizing condemnation of private property for private use, §22-1-3.

Dams.

Electric power plants.

Condemnation of dams, §22-3-22.

Definitions, §22-1-1.

Condemnor, §22-2-1.

Public highway, §22-3-40.

Public road, §22-3-40.

Special master.

Proceedings before special master, §22-2-100.

Deposits.

Proceedings before special master.

Deposit of award into court registry.

Conflicting claims as to deposit, §22-2-114.

EMINENT DOMAIN—Cont'd

Electric power plants.

Compensation.

Payment, §22-3-21.

Damages.

Payment, §22-3-21.

Easements.

Power to purchase, §22-3-20.

Mills, factories, dams, etc.

Condemnation, §22-3-22.

Rights of way.

Power of persons operating, etc., to purchase, condemn, etc., §22-3-20.

Evidence.

Proceedings before assessors.

Evidence to be heard by assessors, §22-2-62.

Exclusive nature of title, §22-1-8.

Executions.

Proceedings before special master.

Issuance of execution upon award of judgment, §22-2-113.

Factories.

Electric power plants.

Condemnation of factories, §22-3-22.

Federal aid public works projects.

Relocation of persons and businesses displaced by projects, §§22-4-1 to 22-4-14. See within this heading, "Relocation assistance."

Fees.

Proceedings before superior court.

Payment of fees to clerk, §22-2-141.

Flood control projects. See within this heading, "Watershed and flood control projects."

Flood roads and highways.

Appeals to superior court, §22-3-44.

Authorization of officers to act for state or county, §22-3-43.

Condemnation procedure, §22-3-43.

Notice of intention to condemn, §22-3-42.

Power to acquire, §22-3-41.

Public highway.

Defined, §22-3-40.

Public road.

Defined, §22-3-40.

Restrictions on use of condemned road by condemnor, §22-3-46.

Rights of action of property owners and public utilities, §22-3-47.

EMINENT DOMAIN—Cont'd

Flood roads and highways—Cont'd

Rights of condemnor pending
appeal, §22-3-45.

Forms.

Proceedings before special master.

Form of award, §22-2-110.

Special master.

Appointing, §22-2-104.

Oath, §22-2-105.

Gas pipelines. See within this heading,
"Oil and gas pipelines."

General assembly.

Right of eminent domain.

Manner in which right may be
exercised, §22-1-4.

Power to determine when right
may be exercised, §22-1-3.

Guardian ad litem.

Notice of condemnation, §22-2-21.

Hearings.

Proceedings before assessor,
§§22-2-60 to 22-2-65. See within
this heading, "Assessors."

Proceedings before special master,
§22-2-102.

Highways.

Flood roads and highways.

Acquisition of right. See within this
heading, "Flood roads and
highways."

Proceedings before special master.

Date of approval of original
location of highway.

Inclusion in petition for
condemnation, §22-2-109.

Proceedings before superior court.

Date of approval of original
location of highway.

Inclusion in petition for
condemnation, §22-2-137.

Newspaper advertisement as to
original location of highway,
§22-2-137.

Special master proceedings.

Newspaper advertisement as to
original location of highway,
§22-2-109.

Interest.

Defined, §22-1-1.

Intervenors.

Proceedings before superior court,
§22-2-139.

EMINENT DOMAIN—Cont'd

Judgments and decrees.

Proceedings before assessors.

Execution on judgment, §22-2-83.

Proceedings before special master.

Executions on judgment,
§22-2-113.

Incorporation of award into
judgment, §22-2-111.

Proceedings before superior court.

Filing and recording of decree,
§22-2-141.

Jury.

Proceedings before assessors.

Appeal to jury in superior court,
§22-2-80.

Proceedings before special master.

Awards.

Discrepancy between award of
special master and verdict of
jury, §22-2-113.

Proceedings before superior court.

Discretion of judge to have issues
tried in first instance by jury,
§22-2-135.

Just compensation.

Effect of failure to agree on, §22-1-7.

Private property.

Right of persons to take or
damage upon payment of just
and adequate compensation,
§22-1-6.

Proceedings before superior court.

Factors to be considered,
§22-2-137.

Required as limitation on exercise of
power of eminent domain,
§22-1-5.

Special master proceedings.

Factors to be considered in
determining or estimating,
§22-2-109.

Leases.

Water supply and waterworks.

Power to lease property or interest,
§22-3-60.

Liens.

Proceedings before superior court.

Actions by court to discharge lien,
§22-2-140.

Lighthouses and beacons.

Condemnation for construction,
§22-3-120.

EMINENT DOMAIN—Cont'd

Lighthouses and beacons—Cont'd

Trees and timber.

Acquisition of right to enter lands and clear or cut timber, §22-3-121.

Manner of assessment.

Parties cannot agree on compensation, §22-3-122.

Mills.

Electric power plants.

Condemnation of mills, §22-3-22.

Minors.

Awards.

Manner of payment, §22-2-86.

Direction of notice where owner minor, §22-2-21.

Nature of right, §22-1-2.

Nonresidents.

Proceedings before assessor.

Direction of notice, §22-2-23.

Notice.

Assessors.

Proceedings before assessors. See within this heading, "Assessors."

Flood roads and highways.

Notice of intention to condemn, §22-3-42.

Proceedings before assessors.

Notification of hearing, §22-2-60.

Telephone companies.

Construction of lines along railroad rights of way. See within this heading, "Telephone companies."

Oaths.

Assessors, §22-2-43.

Special master.

Form of oath, §22-2-105.

Oil and gas pipelines.

Condemnation,

Power to condemn property and interest owned by subdivision of state, §22-3-80.

Corporations authorized to exercise powers.

Description, §22-3-82.

Exercise of power of eminent domain.

Authority of certain persons, §22-3-83.

State subdivisions.

Powers to condemn property and interest, §22-3-80.

EMINENT DOMAIN—Cont'd

Oil and gas pipelines—Cont'd

Traversing of streets, watercourses, etc., for pipeline purposes, §22-3-81.

Persons.

Defined, §22-1-1.

Petitions.

Proceedings before superior court.

See within this heading,

"Superior courts."

Special master. See within this heading, "Special master."

Pipelines.

Oil and gas pipelines. See within this heading, "Oil and gas pipelines."

Private property.

Duty of courts as to laws authorizing condemnation for private uses, §22-1-3.

Exclusive nature of title, §22-1-8.

Right of persons to take or damage upon payment of just and adequate compensation, §22-1-6.

Property.

Defined, §22-1-1.

Public utilities.

Flood roads and highways.

Rights of action of public utilities, §22-3-47.

Railroads.

Telephone and telegraph lines.

Construction along railroad rights of way. See within this heading, "Telephone companies."

Relocation assistance.

Advisory services by state, §22-4-5.

Appeals.

Payments by state agencies, §22-4-11.

Applicability of Code section 22-1-1 to chapter, §22-4-3.

Citation of act, §22-4-1.

Declaration of necessity, §22-4-2.

Effect of chapter on condemnation proceedings, §22-4-14.

Expenses incidental to property transfer, §22-4-6.

Functions provided in chapter as public purposes, §22-4-12.

Legislative findings, §22-4-2.

Litigation expenses.

Inverse condemnation proceedings, §22-4-8.

EMINENT DOMAIN—Cont'd

Relocation assistance—Cont'd

Litigation expenses—Cont'd

Payment by state, §22-4-7.

Municipal corporations.

Exercise of powers granted under chapter, §22-4-11.1.

Payments, §22-4-4.

Income or resources, §22-4-13.

Policies to guide state, public agencies, etc., in acquiring property.

Acquisition of building structures and other improvements, §22-4-10.

Generally, §22-4-9.

Providing of advisory services, §22-4-5.

Rules and regulations.

Adoption by state, public agencies, etc., §22-4-11.

Short title of act, §22-4-1.

State departments and agencies.

Payments, §22-4-4.

Taxation.

Effect of chapter on power of state, public agencies, etc., to tax, §22-4-12.

Remainders and reversions.

Proceedings before assessors serving notice on remaindermen, §22-2-22.

Service of process.

Notice of condemnation.

Manner and time of service, §22-2-25.

Proceedings before special master, §22-2-107.

Directions for notice and service thereof, §22-2-102.

Proceedings before superior court, §§22-2-132 to 22-2-134.

Special master.

Appeals.

Awards.

Use of award in subsequent appeal, §22-2-110.

Appointment, §22-2-103.

Form to be used in appointing special master, §22-2-104.

Attachment of process to petition, §22-2-102.

Awards.

Appeal of award, §22-2-112.

EMINENT DOMAIN—Cont'd

Special master—Cont'd

Awards—Cont'd

Appeals.

Effect of tender, payment or acceptance of award on right of appeal, §22-2-113.

Conclusive as to right of condemnor to take or damage property or interest, §22-2-107.

Deposit of award into court registry.

Effect, §22-2-114.

Discrepancies between award of special master and jury verdict, §22-2-113.

Execution on award.

Issuance, §22-2-113.

Form of award, §22-2-110.

Incorporation into judgment of court, §22-2-111.

Part of record of proceedings, §22-2-110.

Time of filing, §22-2-110.

Use of findings and award in subsequent appeal, §22-2-110.

Vesting of title upon deposit of award into court, §22-2-110.

Compensation, §22-2-106.

Condemning body.

Defined, §22-2-100.

Condemnor.

Defined, §22-2-100.

Date of taking.

Determination, §22-2-109.

Effect of article on other methods of condemnation, §22-2-101.

Forms.

Appointing special master, §22-2-104.

Appointment.

Oath of special master, §22-2-105.

Award, §22-2-110.

Oath of special master, §22-2-105.

Hearings.

Time of hearing before special master, §22-2-102.

Highways.

Approval of original location of highway in petition.

Inclusion of date of approval, §22-2-109.

EMINENT DOMAIN—Cont'd

Special master—Cont'd

Highways—Cont'd

Newspaper advertisement as to original location, §22-2-109.

Inspection of premises.

Allowance by judge of reasonable time, §22-2-106.

Intent of article, §22-2-101.

Just compensation.

Factors to be considered in determining or estimating, §22-2-109.

Notice.

Directions for notice and service, §22-2-102.

Oaths, §22-2-105.

Order to appear before special master, §22-2-102.

Parties.

Order to appear before special master, §22-2-102.

Petitions.

Attachment of process to petition, §22-2-102.

Filing, §22-2-102.

Powers and duties generally, §22-2-108.

Proceedings in rem, §22-2-102.

Service of process, §22-2-107.

Directions for service, §22-2-102.

State.

Flood roads and highways.

Authorization of officers to act for state, §22-3-43.

State departments and agencies.

Relocation assistance. See within this heading, "Relocation assistance."

Subpoenas.

Proceedings before assessors.

Subpoena power of assessors, §22-2-61.

Superior courts.

Appeals.

Award of assessors, §22-2-136.

Assessors.

Appeal from assessors' award, §22-2-136.

Appeal to jury in superior court, §22-2-80.

Appointment, §22-2-135.

Awards.

Appeal from assessors' award, §22-2-136.

Disposition by court, §22-2-138.

EMINENT DOMAIN—Cont'd

Superior courts—Cont'd

Awards—Cont'd

Filing and recording, §22-2-141.

Molding of award of verdict, §22-2-138.

Power of court to adjudge condemnation of title upon deposit into court, §22-2-138.

Scope of award, §22-2-138.

Date of taking, §22-2-137.

Decrees.

Filing and recording, §22-2-141.

Description of condemned property.

Filing and recording, §22-2-141.

Fees.

Payment to clerk of superior court, §22-2-141.

Flood roads and highways.

Appeal to superior court, §22-3-44.

Highways.

Date of approval of original location of highway.

Inclusion in petition, §22-2-137.

Newspaper advertisement as to original location of highway, §22-2-137.

Intervention of interested persons, §22-2-139.

Judgment in rem.

Authority to petition, §22-2-130.

Cause to proceed as in rem, §22-2-132.

Jury.

Discretion of judge to have issues tried in first instance by jury, §22-2-135.

Just compensation.

Factors to be considered in determining or estimating, §22-2-137.

Liens.

Actions by court to discharge tax lien, §22-2-140.

Notice.

Directions for notice and service, §22-2-132.

Tax collector or commissioner, §22-2-134.

Order to appear, §22-2-132.

Other methods of condemnation.

Intent of article, §22-2-142.

Petitions.

Attachment of process, §22-2-132.

EMINENT DOMAIN—Cont'd

Superior courts—Cont'd

Petitions—Cont'd

Authority to petition for judgment
in rem, §22-2-130.

Contents, §22-2-131.

Service of notice, §22-2-132.

Service of process.

Discretion of judge to cause
additional notice or service,
§22-2-134.

Generally, §22-2-133.

Subsequent proceedings.

Effect on rights of condemnor,
§22-2-139.

Tax collector.

Notification, §22-2-134.

Taxes due on property or interest.

Notification of court, §22-2-140.

Verdicts.

Scope of verdict, §22-2-138.

Surveys and surveyors.

Lighthouses and beacons.

Acquisition of right to enter lands
and clear timber for coastal
surveys, §22-3-121.

Taxation.

Proceedings before superior court.

Actions by court to discharge lien,
§22-2-140.

Relocation assistance.

Effect of chapter on power of state
and public agencies to tax,
§22-4-12.

Taxes due on property or interest.

Notification of court by tax
collector or commissioner,
§22-2-140.

Telegraph companies. See within this
heading, "Telephone companies."

Telephone companies.

Construction of lines along railroad
rights of way.

Findings of assessors.

Evidence upon which findings
may be based, §22-3-4.

Form of findings, §22-3-3.

Hearings.

Location of hearing before
assessors, §22-3-4.

Necessity for only one proceeding,
§22-3-3.

Notice of condemnation.

Direction and contents, §22-3-1.

Service, §22-3-2.

EMINENT DOMAIN—Cont'd

Telephone companies—Cont'd

Construction of lines along railroad
rights of way—Cont'd

Proceedings.

Location, §22-3-3.

Necessity for only one
proceeding, §22-3-3.

Time.

Proceedings before assessors.

Fixing time for hearing, §22-2-60.

Trees and timber.

Lighthouses and beacons.

Acquisition of right to enter lands
and clear or cut timber for
purposes of carrying out
coastal surveys, §22-3-121.

Trusts and trustees.

Proceedings before assessors.

Serving notice on trustees,
§22-2-22.

Verdicts.

Proceedings before superior court.

Molding verdict, §22-2-138.

Scope of award or verdict,
§22-2-138.

Waters and watercourses.

Oil and gas pipelines.

Traversing of streets, watercourses,
etc., for pipeline purposes,
§22-3-81.

Watershed and flood control projects.

Condemnation.

Fee simple title to land.

Permanent flooding, §22-3-102.

Procedure, §22-3-101.

Counties.

Authority to exercise power of
eminent domain, §22-3-100.

Water supply and waterworks.

Applicability of article, §22-3-62.

Condemnation.

Authorized, §22-3-60.

Procedure, §22-3-61.

Leases.

Authorized, §22-3-60.

Purchase of property, etc.

Authorized, §22-3-60.

ENCUMBRANCES.

Equity.

Discharge of encumbrances affecting
several interests, §23-2-73.

EQUITY.

Accident and mistake.

Execution of power, §23-2-26.

Form of conveyance.

Contrary to intention of parties,
§23-2-25.

Mistake of fact.

When relieved, §23-2-24.

Mistake of law in instrument.

Agents, §23-2-23.

Contracting parties, §23-2-22.

Negligence.

When negligent complainant
granted relief, §23-2-32.

Original parties or privies.

Relief against, §23-2-34.

Power to relieve to be exercised
cautiously, §23-2-21.

Reformation and execution of
contract distinguished, §23-2-30.

Volunteers.

Mere volunteers generally,
§23-2-23.

What mistakes relievable in equity,
§23-2-21.

When equitable interference not
authorized.

Failure to exercise diligence,
§23-2-29.

Ignorance of fact absent fraud,
§23-2-29.

Mere ignorance of law, §23-2-27.

Mistake in judgment of value,
§23-2-28.

Mutual ignorance of fact, §23-2-28.

Which accidents relievable in equity,
§23-2-20.

Accounts and accounting.

Petition for accounting.

Offer to pay balance unnecessary,
§23-2-75.

Scope of equity jurisdiction,
§23-2-70.

Writ of ne exeat.

Scope of equity jurisdiction,
§23-2-70.

Actions.

Compulsion to litigate, §23-1-21.

Consolidation of actions, §23-4-1.

How equitable relief claimed in civil
action, §23-3-2.

Multiplicity of actions.

Scope of equity jurisdiction over
matters of account, §23-2-70.

EQUITY—Cont'd

Actions—Cont'd

Pending actions.

Effect on purchasers, §23-1-18.

Notice, §23-1-18.

Administration of assets.

Creditors' petitions, §23-2-95.

Decedents' estates.

Marshaling assets, §23-2-93.

Compelled election, §23-2-94.

When equity will interfere with
administration of estates,
§23-2-91.

Distribution.

Rules of distribution, §23-2-90.

Intervention.

Time limit in case disposing of
assets, §23-2-97.

Joint and individual assets.

Application to debts, §23-2-98.

Legal and equitable assets.

Defined, §23-2-90.

Partly legal and partly equitable,
§23-2-90.

Publication of order, §23-2-97.

When equitable assets may be
reached by creditor, §23-2-96.

Wills.

Application for direction or
construction of will, §23-2-92.

Agents.

Accident and mistake.

Mistake of law in instrument,
§23-2-23.

**Ancillary extraordinary remedies,
§23-3-3.**

Assets.

Administration. See within this
heading, "Administration of
assets."

Grounds for equitable relief.

Application of joint and individual
assets to debts, §23-2-98.

Attachments.

Enforcement of judgments, §23-4-37.

Attorneys at law.

Interpleader.

Attorney's fees, §23-3-90.

Awards.

Fraud.

Relief against awards, §23-2-60.

Bills of peace.

Ancillary injunction, §23-3-110.

When equity will entertain,
§23-3-110.

EQUITY—Cont'd

Bona fide purchasers.

Interference with, §23-1-20.

Powers of appointment.

Release, relinquishment or covenant.

When bona fide purchasers affected, §23-2-119.

Bond issues.

Payment of lost bonds or notes, §23-2-3.

Bonds, surety.

Ne exeat.

Defendant's bond, §23-3-23.

Judge's discretion, §23-3-22.

Both parties equally at fault, §23-1-15.

Claim of legal and equitable relief by defendant, §23-4-3.

Clerks of court.

Ex parte proceedings.

Transmittal of proceedings to clerk, §23-4-5.

Proceedings in execution of protective powers.

Transmittal of proceedings to clerk, §23-4-5.

Collateral interpleader, §23-3-92.

Collusion.

Interpleader.

Verification of petition, §23-3-91.

Collusive executions.

Defined, §23-2-113.

When equity may relieve against, §23-2-113.

Common claims.

Consolidation of actions, §23-4-1.

Compulsion to litigate, §23-1-21.

Confidential relations.

Acquisition of antagonistic rights by one in confidential relationship, §23-2-59.

Defined, §23-2-58.

Considers done what ought to be done, §23-1-8.

Consolidation of actions, §23-4-1.

Construction and interpretation.

Construction of conditions, §23-1-23.

Quia timet against all the world.

Liberal construction, §23-3-71.

Contempt.

Enforcement of decree or order, §23-4-37.

Contracts.

Accident and mistake. See within this heading, "Accident and mistake."

EQUITY—Cont'd

Contracts—Cont'd

Accounts growing out of privity of contract.

Scope of equity jurisdiction, §23-2-70.

Apportionment of contracts.

Proper subject of equitable jurisdiction, §23-2-72.

Decrees, §23-4-33.

Disparities in mental ability, §23-2-2.

Inadequate consideration.

Setting aside sale or contract, §23-2-2.

Nonperformance, §§23-2-130 to 23-2-136. See within this heading, "Nonperformance of contract."

Reformation and execution of contract distinguished, §23-2-30.

Rent or hire.

Apportionment of contract, §23-2-72.

Rescission.

Unilateral mistake of fact, §23-2-31.

Volunteer's equity inferior, §23-1-13.

Contributions.

Entitlement to contribution, §23-2-71.

Conveyances.

Accident and mistake.

Form of conveyance contrary to intent, §23-2-25.

Fraud.

Annulment for fraud, §23-2-60.

Quia timet. See within this heading, "Quia timet."

Costs.

Quia timet, §23-3-41.

Damages.

Specific performance.

Damages when specific performance impossible, §23-2-135.

Debtors and creditors.

Administration of assets.

Application of joint and individual assets to debts, §23-2-98.

Application of joint and individual assets to debts, §23-2-98.

Creditors' petitions, §23-2-95.

Interference with creditors, §23-1-22.

When equitable assets may be reached by creditor, §23-2-96.

EQUITY—Cont'd

Decedents' estates.

- Marshaling assets, §23-2-93.
- When equity will interfere with administration of estates, §23-2-91.

Defendants.

- Claim of legal and equitable relief by defendant, §23-4-3.

Definitions.

- Collusive execution, §23-2-113.
- Illusory appointments, §23-2-113.
- Legal and equitable assets, §23-2-90.

Dockets.

- Quia timet against all the world.
- Filing in lis pendens docket, §23-3-62.

Effect of equal equities, §23-1-11.

Election between benefits.

- When compelled, §23-1-24.

Encumbrances affecting several interests.

- Discharge, §23-2-73.

Equal equities.

- Effect, §23-1-11.

Equality in distribution of equitable assets, §23-1-9.

Equitable interpleader. See within this heading, "Interpleader."

Estates.

- Encumbrances affecting several interests.
- Discharge, §23-2-73.

Evidence.

- Fraud.
- Proving existence of fraud, §23-2-57.
- Quia timet against all the world.
- Required evidence, §23-3-64.

Executions.

- Enforcement of decree, §23-4-37.

Executors and administrators.

- Powers of sale.
- When exercisable by successor administrator, trustee, etc., §23-2-116.
- When equity will interfere with administration of estates, §23-2-91.

Ex parte proceedings.

- Initiation, §23-4-4.
- Petitions.
- Receipt of and action on, §23-4-5.
- Transmittal of proceedings to clerk, §23-4-5.

EQUITY—Cont'd

Extraordinary remedies.

- Enforcement, §23-4-38.
- For defendant, §23-3-4.
- How claimed, §23-4-2.

Fault.

- Both parties equally at fault, §23-1-15.
- Unequal fault, §23-1-15.

Fiduciaries.

- Powers of appointment.
- Release, relinquishment or covenant.
- When fiduciaries affected, §23-2-119.

Follows the law, §23-1-6.

Forfeitures.

- Relief against forfeitures, §23-1-23.

Fraud.

- Actual or constructive, §23-2-51.
- Annulment of conveyances, §23-2-60.
- Confidential relations.
- Acquisition of antagonistic rights by one in confidential relationship, §23-2-59.
- Defined, §23-2-58.
- Consummation of fraud, §23-2-56.
- Conveyances.
- Annulment of conveyances for fraud, §23-2-60.
- Judgments and decrees.
- Relief against, §23-2-60.
- Jurisdiction.
- Concurrent jurisdiction over fraud, §23-2-50.
- Misrepresentation as legal fraud, §23-2-52.
- Proving existence, §23-2-57.
- Suppression of fact as fraud, §23-2-53.
- Surprise as form of fraud, §23-2-54.
- Trademarks.
- Use of similar trademarks, §23-2-55.
- Good Samaritan act.**
- Relief in cases of accidents or mistakes of volunteers, §23-2-33.
- Grounds for equitable relief.**
- Accident and mistake. See within this heading, "Accident and mistake."
- Administration of assets. See within this heading, "Administration of assets."
- Fraud. See within this heading, "Fraud."

EQUITY—Cont'd

Guardian ad litem.

Consent, §23-4-33.

Guardians.

Consent of guardian, §23-4-33.

Powers of sale.

When exercisable by successor guardian, §23-2-116.

How equitable relief claimed, §23-3-2.

Ignorance due to negligence, §23-1-17.

Ignorance of fact.

When equitable interference not authorized, §23-2-28.

Ignorance of law.

When equitable interference not authorized, §23-2-27.

Illusory appointments.

Defined, §23-2-113.

When equity may relieve against, §23-2-113.

Injunctions.

Bills of peace.

Ancillary injunction, §23-3-110.

Enforcement, §23-4-38.

Interference with creditors, §23-1-22.

Interlocutory decrees and orders, §23-4-34.

Interpleader.

Application to interplead, §23-3-90.

Attorney's fees, §23-3-90.

Collateral interpleader, §23-3-92.

Costs.

Taxing of costs, §23-3-90.

Petitions.

Verification, §23-3-91.

When compelled, §23-3-90.

Joinder.

Quia timet against all the world, §23-3-70.

Joint and several liability.

Entitlement to contribution, §23-2-71.

Joint tenants and tenants in common.

Accounts between.

Scope of equity jurisdiction, §23-2-70.

Joint tortfeasors.

Entitlement to contribution, §23-2-71.

Judgments and decrees.

Confirmation of sales under decrees, §23-4-35.

Contempt.

Attachment for contempt, §23-4-37.

EQUITY—Cont'd

Judgments and decrees—Cont'd

Decrees affecting property outside jurisdiction, §23-4-32.

Entry of decree by judge, §23-4-30.

Executions against property, §23-4-37.

Fraud.

Relief against judgments and decrees, §23-2-60.

Interlocutory decrees, §23-4-34.

Liens.

Judgment constitutes lien, §23-4-36.

Nature of decree, §23-4-30.

Power of court to mold and enforce decrees, §23-4-31.

Quia timet against all the world.

Effect of recordation of decree, §23-3-67.

Signature by judge, §23-4-30.

Transferability of decree, §23-4-36.

When equity will set aside judgment, §23-2-1.

Will or contract matters, §23-4-33.

Jurisdiction.

Accounts, §23-2-70.

Concurrent jurisdiction of law and equity, §23-1-5.

Effect of legal remedy on exercise of jurisdiction, §23-1-4.

Entitlement to contribution, §23-2-71.

Fraud.

Concurrent jurisdiction over fraud, §23-2-50.

Grounds, §23-1-3.

Powers of appointment, §23-2-110.

Scope of jurisdiction, §23-1-2.

Vested in superior courts, §23-1-1.

Jury.

Quia timet against all the world.

Trial by jury, §23-3-66.

Laches, §23-1-25.

Legal remedies.

Concurrent jurisdiction of law and equity, §23-1-5.

Effect on exercise of jurisdiction, §23-1-4.

Liability.

Joint and several liability.

Entitlement to contribution, §23-2-71.

EQUITY—Cont'd

Liens.

Judgments or decrees constitute lien,
§23-4-36.

Life estates.

Encumbrances affecting several
interests.

Discharge, §23-2-73.

Lis pendens.

Quia timet against all the world.
Filing in lis pendens docket,
§23-3-62.

Loss from act of third party, §23-1-14.

Mingled property.

Burden of distinguishing, §23-2-74.

Misled party superior, §23-1-12.

**Misrepresentation as legal fraud,
§23-2-52.**

Mistake.

Grounds for equitable relief. See
within this heading, "Accident
and mistake."

Modes of remedy, §23-1-2.

Mortgages and deeds of trust.

Powers of sale. See within this
heading, "Powers of sale."

Nature of equity.

Considers done what ought to be
done, §23-1-8.

Follows the law, §23-1-6.

Is equality, §23-1-9.

Seeks to do justice, §23-1-7.

Ne exeat.

Bonds, surety.

Defendant's bond, §23-3-23.

Insufficient security.

Responsibility of officer taking,
§23-3-23.

Required at judge's discretion,
§23-3-22.

Disposition of property, §23-3-24.

Enforcement, §23-4-38.

Issuance of writ without judge's
sanction, §23-3-25.

Nature of writ, §23-3-20.

Replevin.

Refusal of defendant to replevy
property, §23-3-24.

Sanction of judge.

Issuance of writ without sanction,
§23-3-25.

Scope of jurisdiction over matters of
account, §23-2-70.

Showing required of complaining
party, §23-3-21.

EQUITY—Cont'd

Ne exeat—Cont'd

Verification necessary, §23-3-22.

When writ granted, §23-3-20.

Negligence.

Ignorance due to negligence,
§23-1-17.

When negligent complainant granted
relief, §23-2-32.

Nonperformance of contract.

Damages.

Specific performance impossible,
§23-2-135.

Price.

Refusal of decree for inadequacy
of price, §23-2-133.

Specific performance.

Damages.

When specific performance
impossible, §23-2-135.

Parol contracts.

One specific performance for
land decreed, §23-2-131.

When decreed, §23-2-130.

Specific personalty, §23-2-136.

Sufficient part performance,
§23-2-131.

Unfairness.

Refusal of decree for unfairness,
§23-2-133.

Vendor's ability to comply,
§23-2-134.

Voluntary agreements.

When enforced, §23-2-132.

Notice.

Pending actions as notice, §23-1-18.

Quia timet against all the world.

Determination of parties entitled
to notice, §23-3-65.

Service by publication, §23-3-65.

Sale by one without notice, §23-1-19.

Sale to one without notice, §23-1-19.

Scope of notice, §23-1-17.

Taking with notice of equity,
§23-1-16.

Parties.

Who may complain in equity,
§23-4-20.

Partnerships.

Accounts between partners.

Scope of equity jurisdiction,
§23-2-70.

Pending actions.

Effect on purchaser, §23-1-18.

Notice, §23-1-18.

EQUITY—Cont'd

Petitions.

- Creditors' petitions, §23-2-95.
- Ex parte proceedings.
 - Receipt of and action on petition, §23-4-5.
- Interpleader.
 - Verification of petition, §23-3-91.
- Proceedings ex parte, §23-4-4.
- Proceedings in execution of protective powers, §23-4-4.
 - Receipt of and action on petition, §23-4-5.
- Quia timet against all the world.
 - Verification and filing of petition, §23-3-62.

Pleadings.

- Quia timet against all the world.
 - Filing of adverse pleading, §23-3-65.

Powers of appointment.

- Exercise of discretionary powers not compellable, §23-2-111.
- Jurisdiction over powers, §23-2-110.
- Release, relinquishment or covenant.
 - Application of Code sections 23-2-117 through 23-2-119, §23-2-120.
 - Authorized, §23-2-117.
 - Delivery or recordation, §23-2-118.
 - When fiduciaries or bona fide purchasers affected, §23-2-119.
 - Writing required, §23-2-118.
- When faithful execution of power compellable, §23-2-112.

Powers of attorney.

- Accident or mistake in execution of power, §23-2-26.

Powers of sale.

- Exercise of personal representative, transferee, etc., §23-2-114.
- Manner of sale, §23-2-114.
- Strictly construed, §23-2-114.
- Successor administrator, trustee, etc.
 - When exercisable, §23-2-116.
- When private sale authorized, §23-2-115.

Presumptions and burden of proof.

- Distinguishing mingled property, §23-2-74.

Proceedings in execution of protective powers.

- Initiation, §23-4-4.

EQUITY—Cont'd

Proceedings in execution of protective powers—Cont'd

Petitions.

- Receipt of and action on, §23-4-5.
- Transmittal of proceedings to clerk, §23-4-5.

Quia timet.

- Against all the world.
 - Adverse pleading.
 - Filing, §23-3-65.
 - Costs.
 - Taxing as part of costs, §23-3-68.
 - Decree, §23-3-67.
 - Effect of recordation, §23-3-67.
 - Intervention after entering, §23-3-69.
 - Disinterested representatives.
 - Appointment, §23-3-65.
 - Evidence.
 - Other required evidence, §23-3-64.
 - Intervention after entering decree, §23-3-69.
 - Joinder, §23-3-70.
 - Liberal construction, §23-3-71.
 - Lis pendens docket.
 - Filing petition, §23-3-62.
 - Notice.
 - Determination by special master, §23-3-65.
 - Petition.
 - Filing, §23-3-62.
 - Verification, §23-3-62.
 - Purpose of part, §23-3-60.
 - Remedy cumulative, §23-3-72.
 - Service by publication, §23-3-65.
 - Special master.
 - Compensation, §23-3-68.
 - Jurisdiction, §23-3-66.
 - Submission to special master, §23-3-63.
 - Trial by jury, §23-3-66.
 - Venue, §23-3-62.
 - Who may bring proceeding, §23-3-61.
- Conventional quia timet.
 - Cloud on title, §23-3-42.
 - When removable, §23-3-42.
 - Costs, §23-3-41.
 - Purpose of writ, §23-3-40.
 - When relief granted, §23-3-41.

EQUITY—Cont'd

Remainders, reversions and executory interests.

Discharge of encumbrances affecting several interests, §23-2-73.

Remedies.

Ancillary extraordinary remedies, §23-3-3.

Bills of peace. See within this heading, "Bills of peace."

How equitable relief claimed, §23-3-2.

Interpleader. See within this heading, "Interpleader."

Ne exeat. See within this heading, "Ne exeat."

Quia timet. See within this heading, "Quia timet."

Rescission.

Unilateral mistake of fact, §23-2-31.

Rules of construction.

Construction of conditions, §23-1-23.

Sales.

Confirmation of sales under decrees, §23-4-35.

Inadequate consideration.

Setting aside sale or contract, §23-2-2.

Notice.

Sale by one without notice, §23-1-19.

Sale to one without notice, §23-1-19.

Powers of sale. See within this heading, "Powers of sale."

Securities.

Lost securities.

Payment of lost bonds or notes, §23-2-3.

Seeks to do justice, §23-1-7.

Setoffs.

Rule of equity, §23-2-76.

Special master.

Quia timet against all the world. See within this heading, "Quia timet."

Specific performance.

Damages when specific performance impossible, §23-2-135.

Inadequacy of price.

Refusal of decree, §23-2-133.

Parol contracts for land.

When decreed, §23-2-131.

Specific personalty, §23-2-136.

EQUITY—Cont'd

Specific performance—Cont'd

Sufficient part performance, §23-2-131.

Vendor's ability to comply, §23-2-134.

Voluntary agreements.

When enforced, §23-2-132.

When decreed, §23-2-130.

Superior courts.

Jurisdiction and powers, §23-1-1.

Legal and equitable rights given effect, §23-3-1.

Suppression of fact as fraud, §23-2-53.

Surprise as form of fraud, §23-2-54.

Taking with notice of equity, §23-1-16.

Tenancy for years.

Discharge of encumbrances affecting several interests, §23-2-73.

Third parties.

Who bears loss from act, §23-1-14.

Time.

Assets.

Time limit for intervention in case disposing of assets, §23-2-97.

Title.

Cloud on title.

Quia timet, §23-4-2.

Trademarks.

Fraud.

Use of similar trademarks, §23-2-55.

Trusts and trustees.

Cases where account is of a trust fund.

Scope of equity jurisdiction, §23-2-70.

Powers of sale.

When exercisable by successor trustees, §23-2-116.

Volunteer's equity inferior, §23-1-13.

Unequal equities.

Effect, §23-1-11.

Value of property.

Mistake in judgment of value.

When equitable interference not authorized, §23-2-28.

Venue.

Quia timet against all the world.

Venue of proceedings, §23-3-62.

Volunteers.

Mere volunteers in general, §23-2-33.

Volunteer's equity inferior, §23-1-13.

Who may complain in equity, §23-4-20.

EQUITY—Cont'd

Who would have equity must do equity, §23-1-10.

Wills.

Application for direction or construction of will, §23-2-92.

Consent of guardian or guardian ad litem, §23-4-33.

Decrees, §23-4-33.

Powers of sale. See within this heading, "Powers of sale."

ESTATES.

Equity.

Encumbrances affecting several interests.

Discharge, §23-2-73.

EVIDENCE.

Eminent domain.

Proceedings before assessors.

Evidence to be heard by assessors, §22-2-62.

Equity.

Fraud.

Proving existence of fraud, §23-2-57.

Quia timet against all the world.

Required evidence, §23-3-64.

EXECUTIONS.

Eminent domain.

Proceedings before special master.

Issuance of execution upon award of judgment, §22-2-113.

Equity.

Enforcement of decree, §23-4-37.

EXECUTORS AND

ADMINISTRATORS.

Equity.

Powers of sale.

When exercisable by successor administrator, trustee, etc., §23-2-116.

When equity will interfere with administration of estates, §23-2-91.

F

FACTORIES.

Eminent domain.

Electric power plants.

Condemnation of factories, §22-3-22.

FEES.

Attorneys at law.

Interpleader.

Equitable interpleader, §23-3-90.

Eminent domain.

Proceedings before superior court.

Payment of fees to clerk, §22-2-141.

FIDUCIARIES.

Equity.

Powers of appointment.

Release, relinquishment or covenant.

When fiduciaries affected, §23-2-119.

FLOOD CONTROL.

Eminent domain.

Watershed and flood control projects.

Construction and operation, §§22-3-100 to 22-3-101.

See EMINENT DOMAIN.

FORFEITURES.

Equity.

Relief against forfeitures, §23-1-23.

FORMS.

Eminent domain.

Proceedings before special master.

Form of award, §22-2-110.

Special master.

Appointing, §22-2-104.

Oath, §22-2-105.

FRAUD.

Actual fraud.

Defined, §23-2-51.

Constructive fraud.

Defined, §23-2-51.

Equitable relief, §§23-2-50 to 23-2-60.

See EQUITY.

Misrepresentation as legal fraud,

§23-2-52.

Trademarks.

Equity.

Use of similar trademarks, §23-2-55.

G

GENERAL ASSEMBLY.

Eminent domain.

Right of eminent domain.

Manner in which right may be exercised, §22-1-4.

INDEX TO TITLES 22, 23

GENERAL ASSEMBLY—Cont'd

Eminent domain—Cont'd

- Right of eminent domain—Cont'd
- Power to determine when right may be exercised, §22-1-3.

GOOD SAMARITAN ACT.

Equity.

- Relief in cases of accidents or mistakes of volunteers, §23-2-33.

GUARDIAN AD LITEM.

Eminent domain.

- Notice of condemnation, §22-2-21.

Equity.

- Consent, §23-4-33.

GUARDIAN AND WARD.

Equity.

- Consent of guardian, §23-4-33.
- Powers of sale.
- When successor guardian may exercise, §23-2-116.

H

HIGHWAYS.

Eminent domain.

- Proceedings before special master.
 - Date of approval of original location of highway.
 - Inclusion in petition for condemnation, §22-2-109.
- Proceedings before superior court.
 - Date of approval of original location of highway.
 - Inclusion in petition for condemnation, §22-2-137.
- Newspaper advertisement as to original location of highway, §22-2-137.
- Special master proceedings.
 - Newspaper advertisement as to original location of highway, §22-2-109.

I

INJUNCTIONS.

Equity.

- Bills of peace.
- Ancillary injunction, §23-3-110.
- Enforcement, §23-4-38.

INTERPLEADER.

- Equity, §§23-3-90 to 23-3-92.
- See EQUITY.

INTERVENTION.

Eminent domain.

- Proceedings before superior court, §22-2-139.

J

JOINDER.

Equity.

- Quia timet against all the world, §23-3-70.

JOINT AND SEVERAL LIABILITY.

Equity.

- Entitlement to contribution, §23-2-71.

JUDGMENTS AND DECREES.

Eminent domain.

- Proceedings before assessors.
- Execution on judgment, §22-2-83.
- Proceedings before special master.
- Executions on judgment, §22-2-113.
- Incorporation of award into judgment, §22-2-111.
- Proceedings before superior court.
- Filing and recording of decree, §22-2-141.

Equity.

- Confirmation of sales under decrees, §23-4-35.
- Contempt.
 - Attachment for contempt, §23-4-37.
- Decrees affecting property outside jurisdiction, §23-4-32.
- Entry of decree by judge, §23-4-30.
- Executions against property, §23-4-37.
- Fraud.
 - Relief against judgments and decrees, §23-2-60.
- Interlocutory decrees, §23-4-34.
- Liens.
 - Judgment constitutes lien, §23-4-36.
- Nature of decree, §23-4-30.
- Power of court to mold and enforce decrees, §23-4-31.
- Quia timet against all the world.
 - Effect of recordation of decree, §23-3-67.
- Signature by judge, §23-4-30.
- Transferability of decree, §23-4-36.

JUDGMENTS AND DECREES—Cont'd

Equity—Cont'd

When equity will set aside judgment,
§23-2-1.

Will or contract matters, §23-4-33.

JURISDICTION.

Equity.

Accounts, §23-2-70.

Concurrent jurisdiction of law and
equity, §23-1-5.

Effect of legal remedy on exercise of
jurisdiction, §23-1-4.

Entitlement to contribution,
§23-2-71.

Fraud.

Concurrent jurisdiction over fraud,
§23-2-50.

Grounds, §23-1-3.

Powers of appointment, §23-2-110.

Scope of jurisdiction, §23-1-2.

Vested in superior courts, §23-1-1.

JURY.

Eminent domain.

Proceedings before assessors.

Appeal to jury in superior court,
§22-2-80.

Proceedings before special master.

Awards.

Discrepancy between award of
special master and verdict of
jury, §22-2-113.

Proceedings before superior court.

Discretion of judge to have issues
tried in first instance by jury,
§22-2-135.

Equity.

Quia timet against all the world.

Trial by jury, §23-3-66.

L

LACHES.

Equity, §23-1-25.

LEASES.

Eminent domain.

Water supply and waterworks.

Power to lease property or interest,
§22-3-60.

LIABILITY.

Equity.

Joint and several liability.

Entitlement to contribution,
§23-2-71.

LIABILITY—Cont'd

Joint and several liability.

Equity.

Entitlement to contribution,
§23-2-71.

LIENS.

Eminent domain.

Proceedings before superior court.

Actions by court to discharge lien,
§22-2-140.

Equity.

Judgments or decrees constitute lien,
§23-4-36.

LIFE ESTATES.

Equity.

Encumbrances affecting several
interests.

Discharge, §23-2-73.

LIGHTHOUSES AND BEACONS.

Eminent domain.

Construction by United States,
§§22-3-120 to 22-3-122.

See EMINENT DOMAIN.

LIS PENDENS.

Equity.

Quia timet against all the world.

Filing in lis pendens docket,
§23-3-62.

M

MILLS.

Eminent domain.

Electric power plants.

Condemnation of mills, §22-3-22.

MINORS.

Eminent domain.

Awards.

Manner of payment, §22-2-86.

Direction of notice where owner
minor, §22-2-21.

MISREPRESENTATION.

Fraud.

Misrepresentation as legal fraud,
§23-2-52.

N

NEGLIGENCE.

Equity.

Ignorance due to negligence,
§23-1-17.

INDEX TO TITLES 22, 23

NEGLIGENCE—Cont'd

Equity—Cont'd

When negligent complainant granted relief, §23-2-32.

NONRESIDENTS.

Eminent domain.

Proceedings before assessor.

Direction of notice, §22-2-23.

NOTICE.

Eminent domain.

Flood roads and highways.

Notice of intention to condemn,
§22-3-42.

Proceedings before assessors.

Notification of hearing, §22-2-60.

Equity.

Pending actions as notice, §23-1-18.

Quia timet against all the world.

Determination of parties entitled
to notice, §23-3-65.

Service by publication, §23-3-65.

Sale by one without notice, §23-1-19.

Sale to one without notice, §23-1-19.

Scope of notice, §23-1-17.

Taking with notice of equity,
§23-1-16.

O

OATHS.

Eminent domain.

Assessors, §22-2-43.

Special master.

Form of oath, §22-2-105.

OIL AND GAS.

Eminent domain.

Pipelines.

Construction and operation,
§§22-3-80 to 22-3-83.

See EMINENT DOMAIN.

Pipelines.

Eminent domain.

Oil and gas pipelines, §§22-3-80 to
22-3-83.

See EMINENT DOMAIN.

P

PARTIES.

Equity.

Who may complain in equity,
§23-4-20.

PARTNERSHIPS.

Equity.

Accounts between partners.

Scope of equity jurisdiction,
§23-2-70.

PETITIONS.

Equity.

Creditors' petitions, §23-2-95.

Ex parte proceedings.

Receipt of and action on petition,
§23-4-5.

Interpleader.

Verification of petition, §23-3-91.

Proceedings ex parte, §23-4-4.

Proceedings in execution of
protective powers, §23-4-4.

Receipt of and action on petition,
§23-4-5.

Quia timet against all the world.

Verification and filing of petition,
§23-3-62.

PIPELINES.

Eminent domain.

Oil and gas pipelines, §§22-3-80 to
22-3-83.

See EMINENT DOMAIN.

Oil and gas.

Eminent domain, §§22-3-80 to
22-3-83.

See EMINENT DOMAIN.

PLEADINGS.

Equity.

Quia timet against all the world.

Filing of adverse pleading,
§23-3-65.

POWERS OF ATTORNEY.

Equity.

Accident or mistake in execution of
power, §23-2-26.

PRESUMPTIONS.

Equity.

Distinguishing mingled property,
§23-2-74.

PUBLIC UTILITIES.

Eminent domain.

Flood roads and highways.

Rights of action of public utilities,
§22-3-47.

PUBLIC WORKS.

Relocation assistance.

Persons displaced by federal aid
projects, §§22-4-1 to 22-4-14.

See EMINENT DOMAIN.

R

REFORMATION.

Contracts.

- Accident and mistake.
- Reformation and execution in case of mistake distinguished, §23-2-30.

REMAINDERS AND REVERSIONS.

Eminent domain.

- Proceedings before assessors serving notice on remaindermen, §22-2-22.

Equity.

- Discharge of encumbrances affecting several interests, §23-2-73.

REPLEVIN.

Ne exeat.

- Disposition of property, §23-3-24.
- Failure or refusal of defendant to replevy property.
- Disposition by court, §23-3-24.

S

SALES.

Equity.

- Confirmation of sales under decrees, §23-4-35.
- Inadequate consideration.
- Setting aside sale or contract, §23-2-2.
- Notice.
- Sale by one without notice, §23-1-19.
- Sale to one without notice, §23-1-19.

SECURITIES.

Equity.

- Lost securities.
- Payment of lost bonds or notes, §23-2-3.

SERVICE OF PROCESS.

Eminent domain.

- Notice of condemnation.
- Manner and time of service, §22-2-25.
- Proceedings before special master, §22-2-107.
- Directions for notice and service thereof, §22-2-102.

SETOFFS.

Equity.

- Rule of equity, §23-2-76.

STATE OF GEORGIA.

Eminent domain.

- Flood roads and highways.
- Authorization of officers to act for state, §22-3-43.

SUBPOENAS.

Eminent domain.

- Proceedings before assessors.
- Subpoena power of assessors, §22-2-61.

SUPERIOR COURTS.

Eminent domain.

- See EMINENT DOMAIN.

Equity.

- Jurisdiction vested in superior courts, §23-1-1.
- Legal and equitable rights given effect, §23-3-1.

SURVEYS AND SURVEYORS.

Eminent domain.

- Lighthouses and beacons.
- Acquisition of right to enter lands and clear or cut timber for purposes of carrying out coastal surveys, §22-3-121.

T

TAXATION.

Eminent domain.

- Proceedings before superior court.
- Actions by court to discharge lien, §22-2-140.
- Relocation assistance.
- Effect of chapter on power of state and public agencies to tax, §22-4-12.
- Taxes due on property or interest.
- Notification of court by tax collector or commissioner, §22-2-140.

TELEPHONE COMPANIES.

- See EMINENT DOMAIN.

TENANCY FOR YEARS.

Equity.

- Discharge of encumbrances affecting several interests, §23-2-73.

THIRD PARTIES.

Equity.

- Who bears loss from act, §23-1-14.

TIME.

Eminent domain.

- Proceedings before assessors.
- Fixing time for hearing, §22-2-60.

Equity.

- Assets.
- Time limit for intervention in case disposing of assets, §23-2-97.

TITLE.

Equity.

- Cloud on title.
- Quia timet, §23-3-42.

TORTS.

Joint tortfeasors.

- Equity.
- Entitlement to contribution, §23-2-71.

TRADEMARKS.

Equity.

- Fraud.
- Use of similar trademarks, §23-2-55.

Fraud.

- Equity.
- Use of similar trademarks, §23-2-55.

TREES AND TIMBER.

Eminent domain.

- Lighthouses and beacons.
- Acquisition of right to enter lands and clear or cut timber for purposes of carrying out coastal surveys, §22-3-121.

TRUSTS AND TRUSTEES.

Eminent domain.

- Proceedings before assessors.
- Serving notice on trustees, §22-2-22.

Equity.

- Cases where account is of a trust fund.
- Scope of equity jurisdiction, §23-2-70.
- Powers of sale.
- When exercisable by successor trustees, §23-2-116.
- Volunteer's equity inferior, §23-1-13.

U

UNITED STATES.

Lighthouses and beacons.

- Construction.
- Eminent domain, §§22-3-120 to 22-3-122.
- See EMINENT DOMAIN.

V

VENUE.

Equity.

- Quia timet against all the world.
- Venue of proceedings, §23-3-62.

VERDICTS.

Eminent domain.

- Proceedings before superior court, §22-2-138.

W

WATER RESOURCES.

Eminent domain.

- Watershed and flood control projects.
- Construction and operation, §§22-3-100 to 22-3-102.
- See EMINENT DOMAIN.
- Watershed and flood control projects.**
- Construction and operation.
- Eminent domain, §§22-3-100 to 22-3-102.
- See EMINENT DOMAIN.

WATERS AND WATERCOURSES.

Eminent domain.

- Oil and gas pipelines.
- Traversing watercourses for pipeline purposes, §22-3-81.
- Watershed and flood control projects.
- Construction and operation, §§22-3-100 to 22-3-102.
- See EMINENT DOMAIN.

WATER SUPPLY AND WATERWORKS.

Eminent domain.

- Construction and operation of waterworks, §§22-3-60 to 22-3-62.
- See EMINENT DOMAIN.

INDEX TO TITLES 22, 23

WILLS.

Construction and interpretation.

Equity.

Application for direction or
construction of will, §23-2-92.

Equity.

Application for direction or
construction of will, §23-2-92.

Consent of guardian or guardian ad
litem, §23-4-33.

Decrees, §23-4-33.

